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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT HAGOOD, III,
Petitioner,

v.

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; and PERSONNEL BOARD OF THE STATE OF ALABAMA,
Respondents.

Petition for a Writ of Certiorari to the Alabama Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether due process in employment termination is satisfied when an official actually hearing the evidence made credibility findings thereon which were rejected by an administrative body, based solely upon the contradicted statements of one witness, and where a state appellate court subsequently ruled that judicial review of this decision was not "concern[ed] . . . with the truthfulness of the testimony?"

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b) Petitioner represents that the parties to this petition are all named in the caption of this case. To the knowledge of the Petitioner, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

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REFERENCE TO REPORTS OF OPINIONS

The unpublished decision of the Alabama Supreme Court, denying the petition for Writ of Certiorari, was entered on April 18, 1997. (App. 1a). The final decision of the Alabama Court of Civil Appeals, presently unpublished, was entered by the Court on January 10, 1997. (App. 2a). In said decision, the Alabama Court of Civil Appeals withdrew its original decision, and as such, the July 12, 1996 opinion is not included in the appendix herein. The unpublished decision of the Circuit Court of Montgomery County, Alabama, was entered on December 21, 1995. (App. 6a). The unpublished administrative order of the applicable state agency, affirming the dismissal of Robert Hagood, was entered on October 11, 1994.

(App. 16a). And finally, the Recommended Order of the Hearing Officer, recommending reinstatement, was entered on April 9, 1994. (App. 18a).

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the Supreme Court of the State of Alabama being reviewed is dated April 18, 1997. (App. 1a.) The statutory provision conferring jurisdiction upon this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1257(a). In addition, Rule 10 of the Supreme Court Rules provides for review by this Court of decisions by a state court of issues of federal law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV; Section I

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of the law; nor deny any person within its jurisdiction the equal protection of the laws.

Alabama Code, Section 36-26-2(1)

> The following terms wherever used in this article shall have the meanings respectively ascribed to them in this section, unless the context plainly indicates a contrary meaning:
>
> (1) APPOINTING AUTHORITY. The officer, board, commission, person or group of persons having the power to make appointments to offices or positions of trust or employment in the state service.

Alabama Code Sec. 36-26-10. Exempt, unclassified, and classified service

(a) Positions in the service of the state shall be divided into the exempt, the unclassified and the classified service

(b) The exempt service shall include:

(1) Officers elected by the vote of the people.

(2) Officers and employees of the legislature.

(3) All employees of a district attorney's office.

(4) Members of boards and commissions, whether appointed or self-perpetuating, and heads of departments required by law to be appointed by the governor or by boards or commissions with the approval of the governor.

(5) All officers and employees of the state's institutions of higher learning, teacher-training institutions and normal schools, educational, eleemosynary and correctional institutions which are governed and controlled by boards of trustees or similar governing bodies and secondary agricultural schools and vocational schools.

(6) All inmate help in all charitable, penal and correctional institutions.

(7) All commissioned and warrant officers and enlisted men of the national guard and naval militia of the state in their respective military and naval grades.

(8) The governor's private secretary, legal advisor, recording secretary and those employees of the governor's office paid exclusively out of the governor's emergency or contingent funds.

(9) The employees of the state docks department engaged in railroad service and subject to the provisions of an act of congress known as the Railway Labor Act as amended or as it may hereafter be amended.

The services listed in this subsection as exempt shall in no respect be subject to the provisions of this article, anything to the contrary notwithstanding.

(c) The unclassified service shall include:

(1) One confidential assistant or secretary for each board, commission and elected officer and, when requested by the governor, for such department head appointed by the governor; and

(2) All employees of the governor's office not exempted. The positions in the unclassified service enumerated in this subsection may at the request of the appointing authority be filled by classified employees. Each of the employees thus appointed shall, at the conclusion of his occupancy of such position, resume his previous status in the classified service.

(d) The classified service shall include all other officers and positions in the state service.

(e) Except as to services denominated as exempt or unclassified services in subsections (b) and (c) of this section, the governor shall have the power by executive order to extend the provisions of this article to include additional positions or classes of positions.

(f) Employees in the unclassified service shall be subject to the same rules and regulations of employment as apply to employees in the classified service except as to appointment and dismissal.

Alabama Code, Section 36-26-27

(a) An appointing authority may dismiss a classified employee whenever he considers the good of the service will be served thereby, for reasons which shall be stated in writing, served on the affected employee and a copy furnished to the director, which action shall become a public record. The dismissed employee may, within 10 days after notice, appeal from the action of the appointing authority by filing with

the board and the appointing authority a written answer to the charges. The board shall, if demand is made in writing by the dismissed employee within 10 days after notice of discharge, order a public hearing and, if the charges are proved unwarranted, order the reinstatement of the employee under such conditions as the board may determine. Upon a majority vote of the board, the board may impose a punishment other than termination including but not limited to a reinstatement with forfeiture of back wages and benefits between the date of termination and the date of the board's order reinstating the employee, or a suspension up to and including 30 days.

(b) In addition to removal by and appointing authority, persons in the classified service may be removed or disciplined in the manner described in this subsection. Charges may be filed by any officer, citizen or taxpayer of the state with the director who shall, within five days, cause a copy to be served upon the person complained against and shall set a day not less than 10 not more than 20 days after such charges. This hearing may be before the director, a special agent appointed for the purpose by the director or the board itself. If before the director or a special agent, the director or special agent shall take testimony offered in support and denial of such charges and from the same submit to the board, within five days, a finding of facts and law involved and a recommended decision. The board at its next regular or special meeting shall consider said report and modify, alter, set aside or affirm said report and certify its findings to the appointing authority who shall forthwith put the same into effect. If the board hears said charges directly or requires the transcribing and submission of the testimony taken before the director or special agent, it shall make up and file its own findings and decision. The decision of the board based upon its records and the testimony shall be final.

(c) In proceeding under this section it shall be no defense or excuse for a forbidden act or for an omis-

sion to observe the laws or rules that such act or omission was directed by a superior, unless a written direction or order from such superior to that effect is proved. If any employee in the state service shall willfully refuse or fail to appear before any court or judge, any legislative committee or any officer, board or body authorized to conduct any hearing or inquiry or, having appeared, shall refuse to waive immunity from prosecution on account of any matter about which he may be asked to testify at any such hearing or inquiry, such conduct shall be cause for removal.

Alabama Code, Section 41-22-20

(a) A person who has exhausted all administrative remedies available within the agency, other than rehearing, and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) All proceedings for review may be instituted by filing of notice of appeal or review and a cost bond with the agency to cover the reasonable costs of preparing the transcript of the proceeding under review, unless waived by the agency or the court on a showing of substantial hardship. A petition shall be filed either in the circuit court of Montgomery county or in the circuit court of the county in which the agency maintains its headquarters, or unless otherwise specifically provided by statute, in the circuit court of the county where a party other than an intervenor, resides or if a party, other than an intervenor, is a corporation, domestic or foreign, having a registered office or business office in this state, then in the county of the registered office or principal place of business within this state.

(c) The filing of the notice of appeal or the petition does not itself stay enforcement of the agency deci-

sion. If the agency decision has the effect of suspending or revoking a license, a stay or supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the reviewing court, upon petition of the agency, determines that a stay or supersedeas would constitute a probable danger to the public health, safety, or welfare. In all other cases, the agency may grant, or the reviewing court may order, a stay upon appropriate terms, but, in any event, the order shall specify the conditions upon which the stay or supersedeas is granted; provided, however, if the appeal or proceedings for review to any court is from an order of the agency increasing or reducing or refusing to increase rates, fares, or charges, or any of them, or any schedule or parts of any schedule or rates, fares, or charges, the reviewing court shall not direct or order a supersedeas or stay of the action or order to be reviewed without requiring, as a condition precedent to the granting of such supersedeas, that the party applying for supersedeas or stay shall execute and file with the clerk of the court a bond as provided for and required by statute or law. If the circuit court shall fail or refuses to grant supersedeas or stay, the party seeking such relief may petition the appropriate court to which the appeal or review lies to order a supersedeas or stay of the action or order of the agency from which review is sought. After the required bond shall have been filed and approved by the clerk, such agency order shall be stayed and superseded, and it shall be lawful to charge the rates, fares, or charges which have been reduced, refused, or denied by the agency order, until the final disposition of the cause. The provisions of this subsection shall apply when applicable, anything in Rule 60 of the Alabama Rules of Civil Procedure restricting the provisions of this subsection to the contrary notwithstanding.

(d) The notice of appeal or review shall be field within 30 days after the receipt of the notice of or other service of the final decision of the agency upon

the petitioner or, if a rehearing is requested under Section 41-22-17, within 30 days after the receipt of the notice of or other service of the decision of the agency thereon. The petition for judicial review in the circuit court shall be filed within 30 days after the filing of the notice of appeal or review. Copies of the petition shall be served upon the agency and all parties of record. Any person aggrieved who is not a party may petition to become a party by filing a motion to intervene as provided in Section 41-22-14. Failure to file such petition within the time stated shall operate as a waiver of the right of such person to review under this chapter, except that for good cause shown, the judge of the reviewing court may extend the time for filing, not to exceed an additional 30 days, or, within four months after the issuance of the agency order, issue an order permitting a review of the agency decision under this chapter notwithstanding such waiver. Any notice required herein which is mailed by the petitioner, certified mail return receipt requested, shall be deemed to have been filed as of the date it is postmarked. This section shall apply to judicial review from the final order or action of all agencies, and amends the judicial review statutes relating to all agencies to provide a period of 30 days within which to appeal or to institute judicial review.

(e) If there has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts, the court shall order the agency to conduct a prompt fact-finding proceeding under this chapter after having a reasonable opportunity to reconsider its determination on the record of the proceedings.

(f) Unreasonable delay on the part of an agency in reaching a final decision shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency.

(g) Within 30 days after receipt of the notice of appeal or within such additional time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record and transcript of the proceedings under review. With the permission of the court, the record of the proceedings under review may be shortened by stipulation of all parties to the review proceedings. Any party found by the reviewing court to have unreasonably refused to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(h) The petition for review shall name the agency as respondent and shall contain a concise statement of:

(1) The nature of the agency action which is the subject of the petition;

(2) The particular agency action appealed from;

(3) The facts and law on which jurisdiction and venue are based;

(4) The grounds on which relief is sought; and

(5) The relief sought.

(i) In proceedings for judicial review of agency action in a contested case, except where appeal or judicial review is by a trial de novo, a reviewing court shall not itself hear or accept any further evidence with respect to those issues of fact whose determination was entrusted by law to the agency in that contested case proceeding; provided, however, that evidence may be introduced in the reviewing court as to fraud or misconduct of some person engaged in the administration of the agency or procedural irregularities before the agency not shown in the record and the affecting order, ruling, or award from which re-

view is sought, and proof thereon may be taken in the reviewing court. If, before the date set for hearing a petition for judicial review of agency action in a contested case, it is shown to the satisfaction of the court that additional evidence is material and that there were good reasons for failure to present it in the contested case proceeding before the agency, the court may remand to the agency and order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision in the case by reason of the additional evidence and shall file that evidence and any modification, new findings, or decision with the reviewing court and mail copies of the new findings, or decision to all parties.

(j) The review shall be conducted by the court without a jury and, except as herein provided, shall in the review of contested cases be confined to the record and the additions thereto as may be made under subsection (i) of this section. Judicial review shall be by trial de novo in the circuit court where review is sought from tax assessments, tax determinations or tax redeterminations, rulings of the revenue department granting, denying, or revoking licenses, or rulings on petitions for tax refunds, or, unless a subsequent agency statute provides otherwise, where an agency statute existing on the effective date of Act No. 81-855, 1981 Acts of Alabama, or thereafter enacted provides for a trial de novo on appeal to or review by the courts; provided, however, in the review of tax assessments, tax determinations, or tax redeterminations, rulings of the revenue department granting, denying, or revoking licenses, or rulings on petitions for tax refunds, the administrative record and transcript shall be transmitted to the reviewing court as provided in subsection (g) of this section, and, on motion of either party, shall be admitted into evidence in the trial de novo, subject to the rights of either party to assign errors, objections, or motions to exclude calling attention to any testimony or evi-

dence in the administrative record or transcript which is deemed objectionable or inadmissible. Provided further that, with the consent of all parties, judicial review may be on the administrative record and transcript. The court, upon request, shall hear oral argument and receive written briefs.

(k) Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. The court may affirm the agency action or remand the case to the agency for taking additional testimony and evidence or for further proceedings. The court may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) In violation of any pertinent agency rule;

(4) Made upon unlawful procedure;

(5) Affected by other error of law;

(6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretition or a clearly unwarranted exercise of discretion.

(*l*) Unless the court affirms the decision of the agency, the court shall set out in writing, which writ-

ing shall become a part of the record, the reasons for its decision.

STATEMENT OF THE CASE [1]

A. Course of the Proceedings and Dispositions in the Court Below

Robert Hagood ("Hagood"), the Petitioner in the instant proceeding, was an employee of the State of Alabama, serving for approximately two and one-half years as a Pollution Control Specialist for Respondent, the Alabama Department of Environmental Management ("ADEM"). This case arises out of the October 15, 1993 termination of Hagood from this merit system position.

Pursuant to applicable state administrative law, § 36-26-27, *Alabama Code* (1966 Cum. Supp.), Hagood filed a timely challenge of his dismissal to the Alabama State Personnel Board ("Board"). (C. 5). The Board appointed E. J. "Mac" McArthur ("McArthur"), then serving as District Attorney of Macon County and subsequently named to head the Alabama Ethics Commission, (C. 45) as Hearing Officer to conduct an evidentiary hearing regarding Hagood's dismissal. (C. 232-659).

On March 18, 1994, McArthur conducted an extensive hearing at which all affected parties were given a full and fair opportunity to present demonstrative evidence, verbal testimony, and oral argument. *Id.* To this date, the Hearing Officer is the only person who has heard any evidence *ore tenus*. Following the hearing, in a lengthy opinion weighing all the evidence and comparing the credibility and demeanor of witnesses, McArthur concluded that "there was a lack of evidence to show that 'Robert B.

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[1] The assertions contained in the Statement of the Case are drawn, almost entirely, from the final order of the Circuit Court of Montgomery County, Alabama. Where included, references to the record will be preceded by the letter "C". There is no reporter's transcript, and the clerk has inserted the administrative record in sequential numbers with the clerk's record.

Hagood was deficient in his job performance to any significant degree . . .' and recommended to the Board 'that Robert B. Hagood's dismissal be overturned and that he be reemployed with back pay.' " (C. 5-12).[2]

ADEM filed exceptions to McArthur's Report. (C. 58-87). On August 16, 1994, the Board convened to consider these exceptions. (C. 678-87). At that time, the Board heard oral argument from counsel, and during that meeting and the following two meetings of the Board, considered the briefs of the parties; however, at no time did the members of the Board hear evidence *ore tenus*.

Following three regular monthly meetings of the Board, a final agency determination was reached. (C. 13-4). In its final order of October 11, 1994, the Board gave only the following reason for rejecting the findings and recommendation of the hearing officer:

> ". . . [T]he Hearing officer reports the testimony of Hagood's supervisor of counseling on a number of occasions for Hagood's lack of understanding of the pollution regulations, and Hagood's lack of ability to apply those in the field, Hagood's poor communication skills and regulatory presence, and the further warnings to the employee through the performance evaluation process. *The Board concludes, as a matter of law, that this testimony is sufficient evidence to support the termination charge* and thus the Hearing Officer's findings and recommendations should be rejected."

Id. (Emphasis added.) There is no other statement or enunciation anywhere in the record by the Board to justify, explain, or rationalize why it rejected the hearing officer's report, nor does the Board, anywhere in its determination, address the evidence submitted by Hagood or the credibility or demeanor determinations made by McArthur.

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[2] Additional copies of this hearing report are also in the clerk's record, beginning at pages 81 and 669. For the sake of clarity and convenience, any reference to this report will be cited to the first copy thereof, appearing in the record on pages 5 through 12.

Pursuant to the Section 20 of the Alabama Administrative Procedure Act, *Alabama Code* § 41-22-20 (1996 Cum. Supp.), Hagood filed a timely notice of appeal, cost bond, and petition for judicial review with the Fifteenth Judicial Circuit of the State of Alabama. (C. 1-4, 16-7). Following oral argument, but again without opportunity to receive evidence *ore tenus,* Circuit Judge Randall Thomas issued a final order in the case. Judge Thomas' order reversed the Board and directed ADEM and the Board to reinstate Hagood, with back pay, to his position as a Pollution Control Specialist for ADEM. *Id.,* see also (C. 769).

On January 3, 1996, ADEM appealed the ruling of Judge Thomas, to the Alabama Court of Civil Appeals. On July 12, 1996, the Court, acknowledging that the evidence was in dispute, the Court held that "[o]ur concern is not with the *truthfulness* of the testimony" offered to substantiate termination, reversed the Circuit Court. *Alabama Department of Environmental Management v. Hagood,* slip op. no. 295048, January 10, 1997 (Ala. Civ. App.) Subsequently, Hagood filed an Application for Rehearing which was denied on January 10, 1997.

Hagood then filed a timely Petition for Writ of Certiorari with the Alabama Supreme Court. Said petition was denied on April 18, 1997. The instant petition was then prepared and timely filed.

B. Stage and Manner in which federal questions were raised and the disposition thereof

The underlying federal question, whether due process mandates a meaningful post-termination hearing in which a discharged employee may present evidence to a fact finder, was first raised in the Circuit Court of Montgomery County, Alabama. In the initial Petition for Judicial Review, Hagood averred "that the rejection of the hearing officer's recommendation without adequate reasons for doing so . . . [was] made upon unlawful procedure." The

trial court did not reach this issue. Rather, it found that the Board's actions were "unreasonable, arbitrary, and capricious" and therefore violative of the Alabama Code.

This issue was further crystallized in briefs to the state appellate courts, in which Hagood stated that due process requires that "the one who decides must hear" and it is not appropriate for one who was not privy to the evidence to decide a case, citing *Morgan v. U.S.*, 298 U.S. 468 (1931). The Alabama Court of Civil Appeals rejected Hagood's contention and held that the hearing officer's report carries no prosumption of correctness and may be overcome by the agency's "substantial" evidence.[3]

C. Statement of the Facts

Hagood was hired by Dave Davis on March 23, 1991, as a Pollution Control Specialist working in the Resource Conservation Recovery Act Compliance Branch of Alabama Department of Environmental Management's ("ADEM") Land Division. (R. 251) At the time that Hagood was interviewed for the position, Davis had only recently been made a supervisor and Chief of the North Unit of the Resource Conservation Recovery Act Compliance Branch and had never hired or trained any other employee. (R. 335)

Hagood was dismissed from his position as a pollution control specialist at ADEM effective on October 15, 1993. The agency cited, in the dismissal letter sent to the Appellee, poor work performances and a failure to meet the standards established for his job classification over the previous two years. (C. 93). Hagood then appealed his dismissal to the State Personnel Board ("Board") under the authority of *Ala. Code* § 36-26-27, (1975). The Board appointed E. J. "Mac" McArthur as a hearing offi-

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[3] Hagood has argued below that ADEM's evidence was not "substantial" in accordance with state law; however, such issue is not available for review by this Court.

cer to conduct an evidentiary hearing to report his findings of fact, conclusions of law, and a recommended action.

McArthur conducted an extensive evidentiary hearing on March 18, 1994 in which numerous documents were submitted and testimony of twelve witnesses taken. Throughout the course of the proceedings in this case, only McArthur was able to listen to this testimony while observing the demeanor of the witness in order to make a determination of credibility. Folowing this hearing, McArthur weighed the credibility of conflicting evidence and concluded "there was a lack of evidence to show that Robert B. Hagood was deficient in his job performance to any significant degree," and recommended to the Board "that Robert B. Hagood's dismissal be overturned and he be reemployed . . . with back pay." (C. 5-12).

McArthur, in entering his Report and Recommended Order, made extensive factual findings. These findings are set out in full in the appendix attached hereto, at pages 18a-24a. These findings included:

> [N]othing in this hearing indicated to this Hearing Officer that at any time during Hagood's employment at ADEM his standard of conduct failed to be satisfactory. It would seem to this Hearing Officer that [ADEM's claim to the contrary] is an inconsistent and some what arbitrary element of this employee's job appraisal. . . .
>
> During Hagood's tenture at ADEM, his trips to the field to apply the knowledge of the regulations became more and more infrequent. Further, it seemed evident from the testimony at this hearing that Bob Hagood's error and omissions in the field were not corrected [by his supervisors] at that time but were later reported and used to show why Hagood was not performing his job. When Bob Hagood testified, he indicated that at first he did not catch on to the regulations; however, he indicated that he spent the time in which he was kept at the ADEM office to thor-

oughly learn the regulations. Numerous witnesses as called on behalf of Bob Hagood further verified this fact. They stated in their opinion, that Bob had a better understanding of the regulations at the time of his termination than did most any other field inspector. . . .

At one point in time Davis referred to Hagood's writing as that of a fifth grade level. However, it should be noted, that when this Hearing Officer reviewed some of the problems which Davis had with Hagood's written communications, they appeared to be only differences in style and not that of content or correct grammar. . . .

Although Davis testified that he did not feel that Hagood took his job seriously, showed improper field demeanor and poor judgment, *it is entirely appropriate to note the demeanor of these two men at this hearing. Clearly, Mr. Davis and his supervisor, Steve Jenkins, are much more formal than Bob Hagood is. Further, at this hearing, this Hearing Officer observed that Bob Hagood was much more open and relaxed than Davis and Jenkins.* . . .

Davis testified that Hagood was so for [sic] behind in his work at the office that he was not allowed to go out in the field. This testimony does not seem consistence [sic] with testimony from the other witnesses who indicated that Hagood was relegated to a desk and given no job duties. Further, there was ample testimony that others were given more opportunities to go into the field than Bob Hagood was. . . .

Further, there were some disagreements as to the exercise of professional judgment or to the interpretation or regulations; however, it appeared from Hagood's testimony that he had a better grasp on these regulations than did his supervisor. . . .

In conclusion, this case may well revolve around a difference of personalities rather than a deficiency in job performance. Arguable [sic] Robert Hagood did not catch on to field inspections nor did he under-

> stand the regulations as quickly as others did; however, it appears clear that at some point during Hagood's first year at ADEM, his supervisors lost all confidence in his capabilities and his abilities to improve. Based on this, they took many of Hagood's opportunities to learn and to show competence in field investigations away from him. Further, they, in large part, relegated him to a desk. Rather than accept these lack of duties, Bob Hagood developed a proficiency in understanding the regulations at ADEM. Further, as to the errors in Hagood's correspondence as cited by Davis, the changes were mostly editorial in nature. . . .

(Emphasis added.)

These findings of the Hearing Officer were submitted to the Board. Based on the argument of counsel and its review of the administrative record, but without the benefit of testimonial evidence, the Board rejected McArthur's findings and upheld Hagood's termination. As grounds for this finding, the Board concluded that, "as a matter of law" the testimony of an immediate supervisor, supporting termination, was, in and of itself, sufficient to uphold the discharge decision.

REASONS FOR GRANTING THE PETITION

AN EMPLOYEE WITH A PROPERTY INTEREST IN CONTINUED EMPLOYMENT, THREATENED WITH LOSS OF THAT JOB, IS ENTITLED TO A MEANINGFUL POST-TERMINATION HEARING. ROBERT HAGOOD WAS DENIED THIS ESSENTIAL CONSTITUTIONAL RIGHT.

The Fourteenth Amendment to the United States Constitution provides in pertinent part, that "no state shall . . . deprive any person of life, liberty or property without due process of law. . . ." Absent a protected property interest, an employee has no vested interest in any procedural avenue for post termination relief. *Board of Regents v. Roth,* 408 U.S. 564 (1972); see also *Wood v.*

University of So. Mississippi, 539 F.2d 529 (5th Cir. (Ms) 1976); *Bunger v. University of Oklahoma Bd. of Regents*, 95 F.3d 987 (10th Cir. (Ok) 1996); *De Tore v. Jersey City Public Employees Union*, 615 F.2d 980 (3rd Cir. (NJ) 1980); *White v. Thomas*, 660 F.2d 680 (5th Cir. (Tx) 1981).

A property right in continued employment may be created by contract, *Gorman v. Robinson*, 977 F.2d 350 (7th Cir. (Il) 1992); *Wooten v. Clifton Forge School Bd.*, 655 F.2d 552 (4th Cir. (Va) 1981); *Russell v. Harrison*, 736 F.2d 283 (5th Cir. (Ms) 1984); *Stein v. Board of New York, Bureau of Pupil Transp.*, 792 F.2d 13 (2nd Cir. (NY) 1986); *Cummings v. South Portland Housing Auth.*, 985 F.2d 1 (1st Cir. (Me) 1993), custom and practice, *Blakenbaker v. McCook Public Power Dist.*, 940 F.2d 384 (8th Cir. (Ne) (1991); *McLaurin v. Fischer*, 768 F.2d 98 (6th Cir. (Oh) 1985) (Tradition of "permanent" status), or state law. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985).

In the instant case, Hagood claims a protected property interest through the application of Alabama law. Section 36-26-27(a) of the Alabama Code provides that the appointing authority[4] may dismiss classified employee[5] only for "the good of the service." *Ala. Code* (1991 Repl. Vol. § 36-26-27(a)). The former Fifth Circuit, in interpreting this core section, held that Alabama law creates a property right for such state merit system employees. *Thompson v. Bass*, 616 F.2d 1259 (5th Cir. (Al) 1980). The same rule of law continues to apply today in the new

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[4] Section 36-26-2(1) defines an appointing authority as "[t]he officer, board, commission, person or group of persons having the power to make appointments to . . . employment in the state service." *Ala. Code* (1991 Repl. Vol.) § 36-26-2(1). In the instant matter, it is undisputed that, at all times relevant herein Mr. Leigh Peagues, then Director of ADEM, was an "appointing authority" within the meaning of this statute.

[5] Hagood is, pursuant to Section 36-26-10(c), such a "classified employee."

Eleventh Circuit. *Best v. Boswell,* 696 F.2d 1282 (11th Cir. (Al) 1983); see also *Whitfield v. Finn,* 731 F.2d 1506 (11th Cir. (Al) 1984).

This Honorable Court has defined due process in *In re Gault,* 387 U.S. 1 (1967). In *Gault,* Justice Fortas, writing for the Court stated:

> Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. As Mr. Justice Frankfurter has said: "The history of American freedom is, in no small measure, the history of procedure." But in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. "Procedure is to law what 'scientific method' is to science."

Id. at 20-1 (Footnotes omitted.)

The type of procedural due process required in any given situation depends on numbers factors, including, "(1) the private interests at state; (2) the risk that the procedures used will lead to erroneous results and the probable value of the suggested procedural safeguard; (3) and the governmental interests affected." *Little v. Streeter,* 452 U.S. 1 (1981). However, while the requirements for a hearing may vary from case to case based on circumstances, whatever hearing is accorded must not be a mere pretextual sham designed to conceal the wrongful deprivation of a constitutional right. Such a hearing must be meaningful and appropriate to the nature of the particular situation. *Bell v. Burson,* 402 U.S. 535 (1971). "What the Fourteenth Amendment does require, however, 'is "an *opportunity* . . . granted at a meaningful time and in a

meaningful manner.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (Quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 [1965]) (Emphasis added by *Logan* Court.)

In employment termination cases, due process likewise must include a meaningful opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill, supra; Green v. McElroy*, 360 U.S. 475 (1959); see also *Carter v. Western Reserve Psychiatric Habilitation Center*, 767 F.2d 270 (6th Cir. (Oh) 1985); *Wallace v. Shreve Mem. Library*, 97 F.3d 746 (1996); *Richardson v. Felix*, 856 F.2d 505 (3rd Cir. (VI) 1988); *Brown v. Georgia Dept. of Revenue*, 881 F.2d 1018 (11th Cir. (Ga) 1989); *Blankenbaker v. McCook Public Power Dist.*, 940 F.2d 384 (8th Cir. (Ne) 1991); *Helton v. Clements*, 832 F.2d 332 (5th Cir. (Tx) 1987); *Dwyer v. Regan*, 777 F.2d 825 (2nd Cir. (NY) 1985).

It is a long-standing and fundamental tenet of the law that "the one who decides must hear." *Morgan v. United States*, 298 U.S. 468, 481, 80 L.Ed. 1288, 56 S. Ct. 906 (1931). Historically, the Alabama Courts have followed this basic maxim. The Alabama Supreme Court first addressed the question of the deference accorded to an agency (as opposed to a hearing officer) in *Alabama Public Service Commission v. Perkins*, 275 Ala. 1, 151 So. 2d 627 (1962). In affirming the Circuit Court's reversal of a commission ruling on an application regarding a motor carrier's operating rights, that Court stated:

> In the case before us, as we have shown, there was no hearing of evidence by the commission or its members. The evidence was heard *ore tenus* by the attorney-examiner duly appointed by it to conduct the hearing. From the evidence itself and the demeanor of the witnesses, he made findings and drew conclusions which he reported in writing to the commission. While it was the privilege of the commission to reach their own conclusions from the record before them, just as it is the privilege of the court to reach conclu-

> sions contrary to those of the commission, yet, as we have said in reviewing the judgment of the circuit court, the commission was in no better position than the circuit court or this court. Since the attorney-examiner alone saw and heard the witnesses and observed their demeanor on the stand, it would be illogical and unwarranted on the part of both the circuit court and this court not to indulge some favorable presumption in considering the attorney-examiner's report as a part of the whole record. Especially is this true when the findings and conclusions find support in the evidence.
>
> . . .
>
> We have not placed the burden of final decision upon the attorney-examiner; this, as it should, rests upon the members of the Commission. But when as here, the members of the Commission did not personally conduct the hearing and had not otherwise observed the demeanor of the witnesses, the evidence being conflicting, the findings of the attorney-examiner on factual issues should be accorded the usual presumptions. This is a basic theory upon which all appellate tribunals and decision-making bodies not observing the witnesses must operate, having only the benefit of the cold record before them.

Id. at 6-7. Subsequent cases followed the maxim of "the one who decides must hear." See e.g. *Alabama Public Service Commission v. Chem-Haulers, Inc.*, 293 Ala. 677, 309 So. 2d 453 (1975); *Harbin v. Alabama Public Service Commission*, 474 So. 2d 63 (Ala. 1985) ("Where the evidence was presented *ore tenus* and was heard by a hearing examiner and not by the commission members themselves, the presumption of correctness normally accorded to the commission's order will be accorded to the hearing examiner's findings of fact.").

With the advent and recent expansion in use of Administrative Law Judge ("ALJ") or Hearing Officers, this stricture has been rempered by the lawyers and inter-

mediate federal courts. For example, it has been held that an administrative agency is not bound by an ALJ's inferences drawn from evidence presented. *See Drexel Burnham Lamber, Inc. v. Commodity Futures Trading Com'n,* 850 F.2d 742 (D.C. Cir. 1988). Additionally, it has been held that a hearing officer's determinations on matters of law or policy are, ordinarily, reviewed by an agency *de novo. See Iran Air v. Kugelman,* 996 F.2d 1253 (D.C. Cir. 1993). However, courts have held that the factual findings of the only quasi-judicial officer hearing the evidence are still entitled to a degree of deference. *See Magallanes v. Bowen,* 881 F.2d 747 (9th Cir. (Ca) (1989); *Parker for Lamon v. Sullivan,* 891 F.2d 185 (7th Cir. (Il) 1989). In *Magallanes,* a case regarding disability benefits for a social security claimant, the Court held that the "ALJ is responsible for determining credibility and resolving conflicts in [the] testimony. The ALJ is likewise responsible for resolving ambiguities." *Magallanes,* at 750 (Citation omitted.)

In this case, the Alabama Courts have departed from this longstanding and fundamental principle of due process. Here, the Hearing Officer conducted an extensive hearing at which all interested parties were able to present documentary evidence and oral testimony. Following the hearing, the Hearing Officer entered a lengthy proposed order in which he assessed the credibility, demeanor, and veracity of the witness, as well as the weight of the evidence. On the heals of this exhaustive proposed order, the Board, without hearing *any* evidence, rejected the findings and conclusions of the Hearing Officer.

The Board held that "as a matter of law . . . [the testimony of the Supervisor] is sufficient evidence to support the termination charge." It is respectfully submitted that in a myriad of employee discharge cases, there would never be a single one in which the official requesting discharge has not been willing to testify that the employee had several serious and substantial shortcomings. While Mc-

Arthur, the only quasi-judicial officer who ever heard any evidence, questioned the credibility of the Supervisor's testimony, the Alabama Court of Civil Appeals held that "[o]ur concern is not with the *truthfulness* of the testimony." (Emphasis added.)

The net effect of the Court of Civil Appeals' holding is the emasculating of a terminated merit system employee's fundamental avenue for relief—a hearing before a neutral adjudicator, at which time he or she has a meaningful opportunity to present evidence to refute the charges against them. If a termination will be affirmed, "as a matter of law," every time the supervisor testifies that such termination is in the best interest of the service, and the reviewing courts are instructed that "[o]ur concern is not with the truthfulness of the testimony," all employee terminations will be affirmed. Under the rationale of the Alabama Court of Civil Appeals, the terminated employee may only present evidence to an advisor whose opinion on the credibility of a witness may be rejected without any basis in fact. Further, without hearing one shred of testimony, the decision of the agency becomes cloaked in a shroud of "correctness" which *must* be affirmed by the courts if there is "evidence to support the Board's order. . . ." *Alabama Department of Environmental Management* v. *Hagood,* slip op. No. 295048, January 10, 1997 (Ala. Civ. App.) (Citations omitted.)

CONCLUSION

Fundamental principles of due process mandate that a terminated employee with a protected property interest in continued employment is entitled, at a minimum, to a post-termination hearing at which his evidence is weighted and considered by a finder of facts. The procedure approved of herein denies Hagood this right.

For the foregoing reasons, Petitioner Robert Hagood respectfully requests that this Court will grant his Petition for Writ of Certiorari, and, upon the merits of the case, order his reinstatement to his proper position.

Respectfully submitted,

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Dated July 17, 1997

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF ALABAMA

April 18, 1997

1960682

EX PARTE ROBERT B. HAGOOD, III

Petition for Writ of Certiorari to the
Court of Civil Appeals

(In re: Robert Hagood, III v. Alabama Department of Environmental Management) (2950408)
(Montgomery: CV-94-2459)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

SHORES, J.—HOOPER, C.J. AND MADDOX, KENNEDY, AND BUTTS, JJ., CONCUR.

APPENDIX B

ALABAMA
COURT OF CIVIL APPEALS
OCTOBER TERM, 1996-97

2950408

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

v.

ROBERT B. HAGOOD III

Appeal from Montgomery Circuit Court
(CV-94-2459)

ON APPLICATION FOR REHEARING

YATES, Judge

This court's original opinion, dated July 12, 1996, is withdrawn, and the following is substituted therefore:

Robert B. Hagood III was dismissed from his employment as a pollution control specialist with the Alabama Department of Environmental Management ("ADEM"), based upon the charge that he had not met the performance standards of his position. Hagood appealed his dismissal to the State Personnel Board ("the Board"), which

appointed a hearing officer to conduct an evidentiary hearing.

After hearing conflicting testimony concerning Hagood's job performance, the hearing officer concluded that the evidence was insufficient to warrant Hagood's dismissal. The hearing officer submitted his findings to the Board, recommending that Hagood be reinstated with back pay and transferred to a different division of ADEM. ADEM timely filed written exceptions to the hearing officer's report.

After hearing the oral argument of each party's counsel, the Board rejected the hearing officer's findings and recommendations and entered an order upholding Hagood's dismissal. The Board concluded that the hearing officer had failed to recognize that the evidence presented was sufficient to warrant termination. Specifically, the Board stated that "the testimony of Hagood's supervisor . . . [was] sufficient evidence to support the termination charge, and, thus, the hearing officer's findings and recommendations should be rejected."

Hagood appealed the Board's decision to the Circuit Court of Montgomery County. The court, relying upon *State Personnel Dep't v. Mays*, 624 So. 2d 194 (Ala. Civ. App. 1993), reversed the Board's decision and held that the Board's rejection of the hearing officer's findings "was unreasonable, arbitrary, and capricious," and concluded that the Board could only point to "*some* evidence in the record to support ADEM's position." (Emphasis in original.)

ADEM appeals, contending: (1) that the circuit court erroneously substituted its judgment for that of the Board; and (2) that the court erred when it relied on *Mays*, *supra*.

Our review is governed by § 41-22-20(k), Ala. Code 1975. That Code section provides that the Board's order is presumed "prima facie just and reasonable and [that] the court shall not substitute its judgment for that of the

[Board] as to the weight of the evidence on questions of fact." We may not assess the truthfulness of conflicting testimony. *Thompson v. Alabama Dep't of Mental Health*, 477 So. 2d 427 (Ala. Civ. App. 1985). If we conclude that there was evidence to support the Board's order, then we must affirm. *State Dep't of Corrections v. Cooke*, 530 So. 2d 839 (Ala. Civ. App. 1988).

A hearing officer is not a "co-equal statutory authority" with the Board. *Thompson, supra.* Regulation 670-X-5-.07, Alabama State Personnel Department Administrative Code, states that the Board has the authority to "modify, alter, set aside or affirm [a hearing officer's] report." If the Board rejects an officer's findings, the Board's supporting evidence must be substantial when measured against the officer's findings as well as the contrary evidence. *Personnel Board v. King*, 456 So. 2d 80, 82 (Ala. Civ. App. 1984). Substantial evidence is "relevant evidence that a reasonable mind would view as sufficient to support a determination." *Creach v. City of Mobile Police Dep't*, 543 So. 2d 698, 699 (Ala. Civ. App. 1989) (citation omitted).

Hagood's duties as a pollution control specialist were: (1) to inspect facilities falling within the scope of ADEM regulations; (2) to identify and document violations of ADEM regulations at those facilities; (3) to communicate his findings to both the regulated facilities and his ADEM superiors; and (4) to prepare any enforcement actions that might arise from violations he discovered while inspecting those facilities. A proper inspection of a regulated facility requires a pollution control specialist to recognize possible sources of hazardous waste generation, treatment, storage, and disposal.

At the hearing, Dave Davis, Hagood's supervisor, presented evidence indicating: (1) that Hagood's standard of conduct was unsatisfactory; (2) that he lacked a knowledge and an understanding of ADEM regulations; and (3) that he lacked the ability to apply the regulations in

the field. Hagood, primarily through his own testimony, presented evidence contradicting Davis's assertions.

Davis testified that Hagood had been trained to properly gather samples of suspected hazardous wastes. Nevertheless, in Davis's presence, Hagood had used a dirty bottle from a trash can to gather a sample. Hagood admitted that he had done this and argued that his action was appropriate. Davis also testified that, for performance evaluation purposes, he had accompanied Hagood on several inspections. Davis stated that while he was with Hagood, Hagood had failed to recognize obvious possible sources of hazardous waste and had failed to recognize waste storage areas at the facilities under inspection. Hagood admitted that he had failed in this regard, but argued that these particular cases involved differences in judgment between him and Davis. Davis also stated that Hagood had incorrectly informed a facility that it would have to build a new storage area. Davis cited this error and others as examples of Hagood's lack of sufficient knowledge and understanding of ADEM regulations.

Davis's testimony about Hagood's performance and knowledge obviously conflicted with some of Hagood's testimony. Our concern is not with the truthfulness of their testimony, but with whether Davis's testimony, as cited by the Board, was sufficient to warrant the Board's rejecting the hearing officer's report and, thus, affirming Hagood's dismissal. After reviewing the record, we conclude that Davis's evidence not only was relevant, but also was sufficient to support the Board's determination. Therefore, the judgment is reversed and the case is remanded to the circuit court. Our conclusion makes unnecessary a discussion of the other issues raised by ADEM.

ORIGINAL OPINION WITHDRAWN; OPINION SUBSTITUTED; APPLICATION FOR REHEARING OVERRULED AND 39(k) MOTION DENIED; REVERSED AND REMANDED.

Crawley, J., concurs.

Robertson, P.J., concurs in the result only.

APPENDIX C

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

Case No. CV-94-2459-TH

IN THE MATTER OF:

ROBERT B. HAGOOD, III
Plaintiff,

v.

PERSONNEL BOARD OF THE STATE OF ALABAMA and THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
Defendant.

FINAL ORDER

Robert Hagood, the Plaintiff in this case, was dismissed from his state merit system position of Pollution Control Specialist with the Land Division of the Alabama Department of Environmental Management effective October 15, 1993. He appealed that decision to the Personnel Board of the State of Alabama under the provisions of *Ala. Code* 1975, § 36-26-27, and the case was assigned to Hearing Officer E.J. MacArthur for an administrative hearing. The Hearing Officer heard extensive testimony that involved conflicting evidence and was required to assess the credibility of several witnesses. He found that the evidence presented by the Alabama Department of Environmental Management ("ADEM") was not sufficiently credible to justify Hagood's dismissal.

Specifically, the Hearing Officer found the following facts from the conflicting testimony:

In the letter of termination dated October 5, 1993, Leigh Pegues, Director of Alabama Department of Environmental Management informed Mr. Hagood that "I have considered the circumstance regarding your job performance and have decided that termination of your employment is appropriate". Mr. Pegues goes on to state that "you have been given numerous warnings concerning the inadequacy of your performance and have been given numerous opportunities in which to improve your performance." To these charges, the employee/appellant has filed a general denial. Specifically, Hagood contents(sic) that the charges against him are "nothing more than petty personality differences" and are due to a questionable management style at ADEM. Further, Hagood contends that his work performance has been more than competent.

A review of Robert Hagood's personnel record indicates that he possesses a B.A. in History, a B.A. in Biology, and an A.S. in Forestry. Hagood was hired by the State of Alabama, Department of Public Health on or about April 26, 1988.

Hagood transferred to the Alabama Department of Environment Management on or about March 23, 1991. *No* employee disciplinary action was indicated at ADEM or Public Health and no such action was cited in the letter of termination dated October 15, 1993. A further review of employee/appellant's employee performance appraisals shows that while in Public Health (from 1988 through 1991) Hagood's work was consistently rated as "exceeds standards". Further, Hagood's attendance, punctuality, cooperation with co-workers and compliance with rules (standards of conducts) were consistently indicated to be satisfactory. Specifically, Hagood was said to work "efficiently with the public" and to learn from mistakes made.

However, a review of said employee performance appraisals while at ADEM indicates that Hagood's work was initially evaluated as "meet standards", but as of August 1992, said employee's work was evaluated as "does not meet standards". His attendance, punctuality and cooperation with co-workers continued to be rated as satisfactory; however, his compliance with rules (standards of conduct), though initially rated as satisfactory, were rated unsatisfactory in August of 1992. It is entirely appropriated (sic) to note that nothing in this hearing indicated to this Hearing Officer that at any time during Hagood's employment at ADEM his standard of conduct failed to be satisfactory. It would seem to this Hearing Officer that this is an inconsistent and some what arbitrary element of this employee's job appraisal.

Initially, Hagood's supervisors, when considering his probationary status (that is their consideration of recommending Hagood for permanent status) stated that in most respects Hagood met the standards required of a newly employed Pollution Control Specialist and that the Department was currently utilizing his skills regarding the management of pesticides. However, the same statement was accompanied by statements indicating that Hagood's "should strive to improve his writing techniques in dealing with the regulatory community". Further he should "improve his inspection techniques so as to present a more professional and authoritative demeanor in the field". Additionally Hagood was encouraged to reflect that demeanor at the office.

To a great extent these statements sum up this hearing and may well have summed up Bob Hagood's entire employment at ADEM. The Alabama Department of Environment Management focused its case on David Davis' testimony. Mr. Davis is an Environ-

mental Scientist III with the Alabama Department of Environmental Management. He is the supervisor over the north unit compliance branch of the land division. Davis stated that a Pollution Control Specialist had to communicate with the public who are generating hazardous waste. Said Pollution Control Specialist has to determine whether the hazardous waste is generated from a small or big producer, what is the point of origin and where and how is the hazardous waste stored. To do this, the Alabama Department of Environmental Management relies on field inspectors. Robert Hagood was such a field inspector in his position as a Pollution Control Specialist. Davis testified that "it is very hard to grasp the regulations". Further, an employee would typically spend much of his early time at ADEM learning said regulations and would then go with a more senior inspector to the field to apply the knowledge of the regulations to practical circumstances. Davis stated that on numerous early occasions Hagood simply did not have a good grasp of the regulation and had an even harder time applying them to practical situations. Davis stated that Hagood was counseled numerous times on both his lack of knowledge and understanding of the regulations and his lack of ability to apply these regulations in the field. Further, Davis stated that no other employee had such a difficult time as Bob Hagood. Davis further testified that Hagood was one of the first employees which he hired and supervised in his position of Environmental Scientist III.

During Hagood's tenure at ADEM, his trips to the field to apply the knowledge of the regulations became more and more infrequent. Further, it seemed evident from the testimony at this hearing that Bob Hagood's error and omissions in the field were not corrected [by his supervisors] at that time but were later reported and used to show why Hagood was not

performing his job. Davis further stated that he made effort after effort the first year to help this employee. Davis stated that he could have fired Hagood, but chose to give him another chance and extra training. It should be noted that at this point in Hagood's work for the Alabama Department of Environmental Management his field opportunities were vastly limited and he spent much of his time in the office. It was testified to that Bob Hagood used this time to thoroughly learn the regulations. When Bob Hagood testified, he indicated that at first he did not catch on to the regulations; however, he indicated that he spent the time in which he was kept at the ADEM office to thoroughly learn the regulations. Numerous witnesses as called on behalf of Bob Hagood further verified this fact. *They stated in their opinion, that Bob had a better understanding of the regulations at the time of his termination than did most any other field inspector.*

After the first year and the chances which Davis indicated were given to Hagood, problems developed with Hagood's regulatory presence, his writing skills, and his communication skills in the field. At one point in time Davis referred to Hagood's writing as that of a fifth grade level. However, it should be noted, that when this Hearing Officer reviewed some of the problems which Davis had with Hagood's written communications, they appeared to be only differences in style and not that of content or correct grammar. Further, one witness testified that he even wrote correspondence for Hagood in the same style which he used and which seldom drew any corrections. This correspondence was sent in as if Bob Hagood had written it and it was marked up with corrections.

As to Hagood's "regulatory presence" Davis testified that he felt Bob Hagood laughed inappropriately

and that the regulated community would not take him seriously. This was also testified to by Phillip Woods who indicated that Davis and Jenkins did not feel that Hagood was competent and that they felt the regulated community would not take him seriously. Specifically, they felt the regulated community would see him laugh and this would some how compromise his ability as an inspector.

Although Davis testified that he did not feel that Hagood took his job seriously, showed improper field demeanor and poor judgment it is entirely appropriate to note the demeanor of these two men at this hearing. Clearly, Mr. Davis and his supervisor, Steve Jenkins, are much more formal than Bob Hagood is. Further, at this hearing, this Hearing Officer observed that Bob Hagood was much more open and relaxed than Davis and Jenkins.

Davis testified that Hagood was so for (sic) behind in his work at the office that he was not allowed to go out in the field. This testimony does not seem consistence (sic) with testimony from the other witnesses who indicated that Hagood was relegated to a desk and given no job duties. Further, there was ample testimony that others were given more opportunities to go into the field than Bob Hagood was.

The last opportunity for Bob Hagood, according to Alabama Department of Environmental Management was a field inspection done in early fall of 1993. At that time Davis noted numerous errors which existed in Hagood's field inspections. When Bob Hagood testified to these inspections, he cleared up many of the questions concerning said inspections. Hagood had not been given credit for finding a waste site and rather only he had been criticize (sic). *Further, there were some disagreements as to the exercise of professional judgment or to the interpretation or regulations; however, it appeared from Hagood's testimony*

that he had a better grasp on these regulations than did his supervisor. Also, Phillip Woods testified that Robert Hagood was as competent as any other inspector and more competent than most. He testified that he was extremely intelligent and that he had been picked on because he was "country". Woods additionally testified that Hagood had not been given a fair chance and was not being given the same opportunities to succeed that other employees including himself were. Walter Nicholas testified that Bob Hagood was not treated right and was not given a chance. Stephen Maurer testified that Hagood was getting a good grasp of the regulations and that he had an outstanding understanding of chemistry. Charles Sulliven testified that Hagood had been singled out and mistreated. Sulliven further testified that supervisors took exception to Hagood's intelligence. Additionally, Sulliven testified that Hagood was very competent.

In conclusion, this case may well revolve around a difference of personalities rather than a deficiency in job performance. Arguable (sic) Robert Hagood did not catch on to field inspections nor did he understand the regulations as quickly as others did; however, it appears clear that at some point during Hagood's first year at ADEM, his supervisors lost all confidence in his capabilities and his abilities to improve. Based on this, they took many of Hagood's opportunities to learn and to show competence in field investigations away from him. Further, they, in large part, relegated him to a desk. Rather than accept these lack of duties, Bob Hagood developed a proficiency in understanding the regulations at ADEM. Further, as to the errors in Hagood's correspondence as cited by Davis, the changes were mostly editorial in nature.

The Hearing Officer concluded from the disputed evidence that Hagood had been treated differently from other

employees and that his dismissal was wrongful in the sense that he was judged by more stringent standards than those by which other employees were judged. He recommended that Hagood's dismissal be overturned and that he be paid his back pay.

ADEM appealed the Hearing Officer's decision to the State Personnel Board under the provisions of *Ala. Code* 1975, § 41-22-15 and Rule 670-X-5-.07 of the Administrative Code. The Board continued the case at two of its monthly meetings, being unable to reach a conclusion upon the merits of the appeal. Finally, on October 11, 1994, it entered an order observing that there was *some* evidence in the record to support the dismissal, and that it "rejected" the findings of the Hearing Officer as to the conflicting evidence and as to the demeanor of the witnesses. It is noteworthy that the Board *made no findings as to why it rejected conflicting evidence in Hagood's favor, or whether it decided that the witnesses who testified for Hagood were not credible, or why it elected to believe the testimony of Hagood's supervisors, the credibility of which had been questioned by the Hearing Officer.*

The Board did not even discuss or allude to the portion of the evidence that the Hearing Officer relied upon to reach his conclusion.

CONCLUSIONS OF LAW

This case is clearly controlled by the law as stated in the case of *State Personnel Department v. Mays*, 624 So.2d 194 (Ala. 1993). There, a hearing officer had weighed the credibility of conflicting testimony and found in favor of the employee. The Board had rejected the recommendations of the hearing officer by claiming that he had ignored certain pieces of evidence. The trial court and Court of Civil Appeals noted, however, that the hearing officer had made careful findings upon all of the evidence. At 624 So.2d 197-198, the appellate court said:

We recognize that the Board is not bound by the credibility determinations of the hearing officer. However, we do not find the Board's supporting evidence in this case to be "substantial when measured against the [hearing officer's] contrary findings as well as the opposing evidence." Furthermore, while the hearing officer's recommendations are not binding upon the Board, the Board's discretion is not unbridled. The Board must have some reasonable justification for its determination or base it upon adequate principles or fixed standards so that it will not be arbitrary or capricious. *Alabama Medicaid Agency v. Beverly Enterprises*, 521 So.2d 1329 (Ala. Civ.App. 1987).

In its order reversing the Board's decision, the trial court stated as follows:

"This court has searched in vain for any reasonable grounds upon which the Personnel Board can rely for rejecting [the hearing officer's] findings. There is no evidence that the Board received any new evidence at the review hearing. There is no evidence that the Board observed some procedural error in the transcript of the hearing before [the hearing officer]. There is no evidence that [the hearing officer] omitted from consideration some substantive testimony that would be indicative [of] a flawed judgment. There is no evidence that [the hearing officer] was biased in any way for or against any party or witness. During oral arguments, counsel for the Department of Personnel could offer no justification for the Board's rejection of [the hearing officer's] finding."

"The only ground upon which the [Personnel Department] stands for rejecting [the hearing officer's] findings and recommendation is that he ignored certain contemporaneous circumstances. As pointed out earlier, the facts relied upon by the Board in reject-

> ing the hearing officer's findings are clearly erroneous in that [the hearing officer] specifically addresses each alleged omission in his report."
>
> In view of the standard of review we are governed by in this case, we find that the Board's action was unsupported by the evidence. We hold that the trial court correctly determined that the Board's rejection of the findings of the hearing officer was done without substantial justification and was, therefore, unreasonable, arbitrary, and capricious. § 41-22-20 (k)(7), Code 1975. Therefore, the trial court's judgment is affirmed. (Some citations omitted).

Here, the Personnel Board did not point to any evidence that was ignored by the Hearing Officer as it had done in *Mays*. Rather, the Board only noted that it could find *some* evidence in the record to support ADEM's position. The hearing in *Mays* clearly requires more than that of the Board. To withstand a challenge that its action was unreasonable, arbitrary, and capricious, it should have addressed, and not have totally ignored, the wealth of contrary evidence that the Hearing Officer clearly believed. It also should have addressed the concerns of the Hearing Officer about the *demeanor* of the witnesses for ADEM.

For the foregoing reasons it is ORDERED, ADJUDGED AND DECREED that the decision of the Personnel Board entered on October 11, 1994 was unreasonable, arbitrary, and capricious, and that it must be set aside under *Ala. Code* 1975, § 41-22-20. The employee, Robert B. Hagood, is hereby ordered to be restored to his position of Pollution Control Specialist with full back pay.

Cost of these proceedings are taxed against the Defendants.

Done this the 21st day of December 1995.

/s/ H. Randall Thomas
Circuit Judge

APPENDIX D

BEFORE THE PERSONNEL BOARD
OF THE STATE OF ALABAMA

IN THE MATTER OF
THE APPEAL OF
ROBERT B. HAGOOD, III

OCTOBER 11, 1994

This matter came before the Board upon the dismissal of the employee from his employment with the Department of Environmental Management. The employee was dismissed effective October 15, 1993, based upon charges contained in a letter to the employee dated that date. This matter was assigned to the Honorable E. J. McArthur as Hearing Officer for the State Personnel Board and a hearing was held on this matter on March 18, 1994. The Hearing Officer's Report, together with Exceptions to the Report filed by the department and a Response to such Exceptions filed by the employee, is now before the Board for consideration. The Board has also had the benefit of oral arguments.

Essentially, the charge against the employee is inadequate job performance.

The Hearing Officer found that there was a lack of evidence to show that Robert Hagood was deficient in his job performance to any significant degree, and recommended his reinstatement. However, the Hearing Officer reports the testimony of Hagood's supervisor of counseling on a number of occasions for Hagood's lack of understanding of the pollution regulations, and Hagood's lack of ability to apply these in the field, Hagood's poor communication skills and regulatory presence, and the further warnings to the employee through the performance evaluation process. The Board concludes, as a matter of

law, that this testimony is sufficient evidence to support the termination charge and thus the Hearing Officer's findings and recommendation should be rejected.

Based upon this conclusion, the Board is of the opinion that the decision of the appointing authority to dismiss the employee is supported by the evidence and that the termination was warranted. The Board has searched the record for evidence of mitigation of punishment and finds that mitigation of punishment is not appropriate in this case.

It is therefore the Order of this Board that the decision of the appointing authority to dismiss the employee is hereby affirmed.

/s/ Halycon V. Ballard
HALYCON V. BALLARD
Secretary

/s/ Joe H. Williamson
JOE H. WILLIAMSON
Chairman

/s/ Ruth Harrell
RUTH HARRELL
Vice-Chairman

/s/ Joe N. Dickson
JOE N. DICKSON
Member

/s/ Harry McMillan
HARRY MCMILLAN
Member

APPENDIX E

IN THE MATTER OF THE APPEAL OF ROBERT HAGOOD

BEFORE THE STATE PERSONNEL BOARD

A hearing was held on this matter before the undersigned Hearing Officer on Friday, March 18, 1994. Mr. Hagood was present and represented by his Attorney, Julian McPhillips. The Department of Environmental Management was represented by its Attorney, Ms. Rebecca Patty.

STATEMENT OF THE CASE

Robert Hagood appeals his dismissal as a Pollution Control Specialist with the Land Division of the Alabama Department of Environment Management effective October 15, 1993. In the letter of termination dated October 15, 1993, Leigh Pegues, Director of Alabama Department of Environment Management informed Mr. Hagood that "I have considered the circumstance regarding your job performance and have decided that termination of your employment is appropriate". Mr. Pegues goes on to state that "you have been given numerous warnings concerning the inadequacy of your performance and have been given numerous opportunities in which to improve your performance". To these charges, the employee/appellant has filed a general denial. Specifically, Hagood contents that the charges against him are "nothing more than petty personality differences" and are due to a questionable management style at ADEM. Further, Hagood contends that his work performance has been more than competent.

FINDING OF FACTS

A review of Robert Hagood's personnel record indicates that he possesses a B.A. in History, a B.A. in Biol-

ogy and a A.S. in Forestry. Hagood was hired by the State of Alabama, Department of Public Health on or about April 26, 1988. Hagood transferred to the Alabama Department of Environment Management on or about March 23, 1991. *No* employee disciplinary action was indicated at ADEM or Public Health and no such action was cited in the letter of termination dated October 15, 1993. A further review of employee/appellant's employee performance appraisals shows that while in Public Health (from 1988 through 1991) Hagood's work was consistently rated as "exceeds standards". Further, Hagood's attendance, punctuality, cooperation with co-workers and compliance with rules (standards of conducts) were consistently indicated to be satisfactory. Specifically, Hagood was said to work "efficiently with the public" and to learn from mistakes made.

However, a review of said employee performance appraisals while at ADEM indicates that Hagood's work was initially evaluated as "meet standards", but as of August, 1992, said employee's work was evaluated as "does not meet standards". His attendance, punctuality and cooperation with co-workers continued to be rated as satisfactory; however, his compliance with rules (standards of conduct), though initially rated as satisfactory, were rated unsatisfactory in August of 1992. It is entirely appropriated to note that nothing in this hearing indicated to this Hearing Officer that at any time during Hagood's employment at ADEM his standard of conduct failed to be satisfactory. It would seem to this Hearing Officer that this is an inconsistent and some what arbitrary element of this employee's job appraisal.

Initially, Hagood's supervisors, when considering his probationary status (that is their consideration of recommending Hagood for permanent status) stated that in most respects Hagood met the standards required of a newly employed Pollution Control Specialist and that the Department was currently utilizing his skills regarding the

management of pesticides. However, the same statements was accompanied by statements indicating that Hagood "should strive to improve his writing techniques in dealing with the regulatory community". Further he should "improve his inspection techniques so as to present a more professional and authoritative demeanor in the field". Additionally Hagood was encouraged to reflect that demeanor at the office.

To a great extent these statements sum up this hearing and may well have summed up Bob Hagood's entire employment at ADEM. The Alabama Department of Environment Management focused its case on David Davis' testimony. Mr. Davis is an Environmental Scientist III with the Alabama Department of Environmental Management. He is the supervisor over the north unit compliance branch of the land division. Davis stated that a Pollution Control Specialist had to comunicate with the public who are generating hazardous waste. Said Pollution Control specialist has to determine whether the hazardous waste is generated from a small or big producer, what is the point of origin and where and how is the hazardous waste stored. To do this, the Alabama Department of Environmental Management relies on field inspectors. Robert Hagood was such a field inspector in his position as a Pollution Control Specialist. Davis testified that "it is very hard to grasp the regulations". Further, an employee would typically spend much of his early time at ADEM learning said regulations and would then go with a more senior inspector to the field to apply the knowledge of the regulations to practical circumstance. Davis stated that on numerous early occasions Hagood simply did not have a good grasp of the regulation and had an even harder time applying them to practical situations. Davis stated that Hagood was counseled numerous times on both his lack of knowledge and understanding of the regulations and his lack of ability to apply these regulations in the field. Further, Davis stated that no other employee had had such a difficult time as Bob Hagood. Davis further

testified that Hagood was one of the first employees which he hired and supervised in his position of Environmental Scientist III.

During Hagood's tenure at ADEM, his trips to the field to apply the knowledge of the regulations became more and more infrequent. Further, it seemed evident from the testimony at this hearing that Bob Hagood's errors and omissions in the field were not corrected at that time but were later reported and used to show why Hagood was not performing his job. Davis further stated that he made effort after effort the first year to help this employee. Davis stated that he could have fired Hagood, but chose to give him another chance and extra training. It should be noted that at this point in Hagood's work for the Alabama Department of Environmental Management his field opportunities were vastly limited and he spent much of his time in the office. It was testified to that Bob Hagood used this time to thoroughly learn the regulations. When Bob Hagood testified, he indicated that at first he did not catch on to the regulations; however, he indicated that he spent the time in which he was kept at the ADEM office to thoughly learn the regulations. Numerous witnesses as called on behalf of Bob Hagood further verified this fact. They stated in their opinion, that Bob had a better understanding of the regulations at the time of his termination than did most any other field inspector.

After the first year and the chances which Davis indicated were given to Hagood, problems developed with Hagood's regulatory presence, his writing skills, and his communication skills in the field. At one point in time Davis referred to Hagood's writing as that of a fifth grade level. However, it should be noted, that when this Hearing Officer reviewed some of the problems which Davis had with Hagood's written communications, they appeared to be only differences in style and not that of content or correct grammar. Further, one witness testified that he even wrote correspondence for Hagood in the same style which he used and which seldom drew any corrections.

This correspondence was sent in as if Bob Hagood had written it and it was marked up with corrections.

As to Hagood's "regulatory presence" Davis testified that he felt Bob Hagood laugh [sic] inappropriately and that the regulated community would not take him seriously. This was also testified to by Phillip Woods who indicated that Davis and Jenkins did not feel that Hagood was competent and that they felt the regulated community would not take him seriously. Specifically, they felt the regulated community would see him laugh and this would some how compromise his ability as an inspector.

Although Davis testified that he did not feel that Hagood took his job seriously, showed improper field demeanor and poor judgment, it is entirely appropriate to note the demeanor of these two men at this hearing. Clearly Mr. Davis and his supervisor, Steve Jenkins, are much more formal than Bob Hagood is. Further, at this hearing, this Hearing Officer observed that Bob Hagood was much more open and relaxed than Davis and Jenkins.

Davis testified that Hagood was so for [sic] behind in his work at the office that he was not allowed to go out in the field. This testimony does not seem consistence [sic] with testimony from the other witnesses who indicated that Hagood was relegated to a desk and given no job duties. Further, there was ample testimony that others were given more opportunities to go into the field than Bob Hagood was.

The last opportunity for Bob Hagood, according to Alabama Department of Environmental Management was a field inspection done in early fall of 1993. At that time Davis noted numerous errors which existed in Hagood's field inspections. When Bob Hagood testified to these inspections, he cleared up many of the questions concerning said inspections. Hagood had not been given credit for finding a waste site and rather only he had been criticize [sic]. Further, there were some disagreements as to

the exercise of professional judgment or to the interpretation of regulations; however, it appeared from Hagood's testimony that he had a better grasp on these regulations than did his supervisor. Also, Phillip Woods testified that Robert Hagood was as competent as any other inspector and more competent than most. He testified that he was extremely intelligent and that he had been picked on because he was "country". Woods additionally testified that Hagood had not been given a fair chance and was [sic] not been given the same opportunities to succeed that other employees including himself were. Walter Nicholas testified that Bob Hagood was not treated right and was not given a chance. Stephen Maurer testified that Hagood was getting a good grasp of the regulations and that he had an outstanding understanding of chemistry. Charles Sulliven testified that Hagood had been singled out and mistreated. Sulliven further testified that supervisors took exception to Hagood's intelligence. Additionally, Sulliven testified that Hagood was very competent.

In conclusion, this case may well revolve around a difference of personalities rather than a deficiency in job performance. Arguable, [sic] Robert Hagood did not catch on to field inspections nor did he understand the regulations as quickly as other [sic] did; however, it appears clear that at some point during Hagood's first year at ADEM, his supervisors lost all confidence in his capabilities and his abilities to improve. Based on this, they took many of Hagood's opportunities to learn and to show competence in field investigations away from him. Further, they, in large part, relegated him to a desk. Rather than accept these lack of duties, Bob Hagood developed a proficiency in understanding the regulations at ADEM. Further, as to the errors in Hagood's correspondence as cited by Davis, the changes were mostly editorial in nature.

CONCLUSIONS OF LAW

Having heard all of the evidence presented in this hearing and in consideration of the demeanor of the parties and

in consideration of the entire work record of Robert Hagood there is a lack of evidence to show that Robert Hagood was deficient in his job performance to any significant degree. Further, it appears evident from this hearing that Robert Hagood was treated differently from other employees in that he apparently was held to a more stringent standard as far as his work.

RECOMMENDATION

For the above stated reasons and in consideration of the employee's entire work record, it is hereby recommended that Robert Hagood's dismissal be overturned and that he be reemployed as Pollution Control Specialist with the Alabama Department Environmental Management with back pay. Further, it is this Hearing Officer's opinion that Robert Hagood should be transferred to a different division at ADEM.

/s/ E.J. "Mac" MacArthur
E.J. "MAC" MACARTHUR
Hearing Officer

April 9, 1994

Supreme Court, U.S.
FILED
AUG 14 1997
CLERK

No. 97-108

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT HAGOOD, III,

Petitioner,

v.

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; AND PERSONNEL BOARD OF THE STATE OF ALABAMA,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

1. Whether due process in the employment termination before the court is satisfied when the hearing officer's findings were rejected by the State Personnel Board, based upon a finding that evidence existed in the record to support the termination.

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b) Petitioner represents that the parties to this petition are all named in the caption of this case. To the knowledge of the Petitioner, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

REFERENCE TO REPORTS OF OPINIONS

The unpublished decision of the Alabama Supreme Court, denying the petition for Writ of Certiorari, was entered on April 18, 1997. (Petitioner's Brief, Appl. 1a). The Court Entered the final decision of the Alabama Court of Civil Appeals, presently unpublished, on January 10,

1997. (Petitioner's Petition For A Writ Of Certiorari, App. 2a). In said decision, the Alabama Court of Civil Appeals withdrew its original decision, and as such, the July 12, 1996 opinion is not included in the appendix herein. The unpublished decision of the Circuit Court of Montgomery County, Alabama was entered on December 21, 1995. (Petitioner's Petition For A Writ Of Certiorari, App. 6a). The unpublished administrative order of the applicable state agency, affirming the dismissal of Robert Hagood, was entered on October 11, 1994. (Petitioner's Petition For A Writ Of Certiorari, App. 16a). And finally, the Recommended Order of the Hearing officer, recommending reinstatement, was entered on April 9, 1994. (Petitioner's Petition For A Writ Of Certiorari, App. 18a).

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the Supreme Court of the State of Alabama being reviewed is dated April 18, 1997. (Petitioner's Petition For A Writ Of Certiorari, App. 1a.) The statutory provision conferring jurisdiction upon this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1257(a). In addition, Rule 10 of the Supreme Court Rules provides for review by this Court of decisions by a state court of issues of federal law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

See Petitioner's Petition For A Writ Of Certiorari, pp. 2-12.

STATEMENT OF THE CASE[1]

A. Course Of The Proceedings And Dispositions In The Court Below

The Petitioner, Robert Hagood, was dismissed from his position as a pollution control specialist with the Defendant, the Alabama Department of Environmental Management ("ADEM") on October 15, 1993. ADEM cited, in the dismissal letter sent to the Petitioner, poor work performances and a failure to meet the standards established for his job classification for the two years preceding his termination. (C. 93-94). Mr. Hagood appealed his dismissal to the State Personnel Board ("Board") under the authority of *Ala. Code* §36-26-27, (1975). The Board appointed a Hearing Officer to conduct an evidentiary hearing to report his findings of fact, conclusions of law, and a recommended action.

The Hearing Officer conducted a hearing on March 18, 1994. The Hearing Officer concluded "there was a lack of evidence to show that Robert B. Hagood was deficient in his job performance to any significant degree," and recommended to the Board "that Robert B. Hagood's dismissal be overturned and that he be re-employed ... with back pay." (C. 5-12).

ADEM filed written exceptions to the Hearing Officer's Report. (C. 58-87). The Plaintiff filed a Rebuttal to the written exceptions. (C. 46-56). The Board heard oral argument from the parties on August 16, 1994. The

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[1] The letter "C" rather than "R" precedes all citations to the record contained in this brief, because there is no separate reporter's transcript in this case. The clerk of court, below, has instead inserted the administrative record in sequential number with the clerk's record.

Board reviewed and considered the record in this proceeding over the next two monthly meetings, and entered an order on October 11, 1994, rejecting the Hearing Officer's conclusions and recommendation, and upholding Mr. Hagood's dismissal. (C. 13-14). During the October 11, 1994 meeting, the Plaintiff filed a Motion to Recuse Board Member Harrell from considering the appeal. (C. 43-45). The Board by preliminary Order, denied the Motion to Recuse as untimely and without merit. (C. 15). The Board's Order upholding the dismissal concluded, as a matter of law, that there was sufficient evidence to support the dismissal charge and that the termination was warranted. (C. 13-14). Mr. Hagood then appealed to the Montgomery Circuit Court pursuant to *Ala. Code* § 41-22-20, (1975).

On December 6, 1995, the parties presented oral argument before Circuit Judge Randall Thomas. On December 21, 1995, Judge Thomas issued an Order reversing the decision of the Board and ordering Mr. Hagood reinstated with back pay.

On January 3, 1996 ADEM pursuant to *Ala. Code* § 41-22-21, (1975) filed an appeal from the Circuit Court's ruling with the Alabama Court of Civil Appeals. (C. 763-764).

B. Stage And Manner In Which Federal Questions Were Raised And The Disposition Thereof

See Petitioner's Petition For A Writ Of Certiorari, pp. 14-15. In addition the Petitioner fails to cite the fact that he petitioned the Supreme Court for the State of

Alabama for certiorari on the issue cited and the writ was denied.

C. Statement Of The Facts

On October 15, 1993, the Alabama Department of Environmental Management ("ADEM") terminated the employment of the Appellee, Robert Hagood. Mr. Hagood was informed orally and in writing that his termination was due to his failure to meet the performance standards of his position. (C. 93-94)

Dave Davis hired Mr. Hagood on March 23, 1991, as a Pollution Control Specialist working in the RCRA Compliance Branch of ADEM's Land Division. (C. 251). At the time that Mr. Hagood was interviewed for the position, Dave Davis had only recently been made a supervisor and Chief of the North Unit of the RCRA Compliance Branch. (C. 335). Mr. Hagood was the first employee Mr. Davis hired. (C. 335).

The RCRA Compliance Branch of ADEM's Land Division is charged with enforcing ADEM Hazardous Waste Regulations. Mr. Hagood's position was that of a hazardous waste inspector. As an inspector, Mr. Hagood was required to inspect regulated facilities on behalf of ADEM, identify and document violations of regulations, communicate the nature of those violations to the regulated community and his supervisors, and prepare appropriate enforcement actions. When inspecting a facility, it is the inspector's job to recognize possible points of hazardous waste generation, treatment, storage and disposal. Recognition of regulated units of hazardous waste requires discretion and professional judgment by inspectors while in the field. Although many substances are specifically listed

in the regulations as hazardous wastes ("listed wastes"), there are many regulated hazardous wastes which are not listed by name as hazardous wastes. Instead, there must be a determination made as to whether the waste exhibits a characteristic of hazardous waste such as toxicity, reactivity, ignitability or corrosivity (characteristic wastes). In many cases, a sample of the waste must be taken to determine if the waste exhibits any of the four characteristics mentioned above. Additionally, an inspector must be able to recognize signs of illegal disposal of hazardous wastes, such as distressed vegetation, suspicious stains, etc. (C. 252-256).

ADEM provides extensive training in inspection techniques, sampling protocol, and regulatory interpretation in order to provide its field inspectors with the skills and training necessary to perform their jobs. During his first three months on the job, Mr. Hagood was given extensive training to include the study of regulations, extensive field training, and the observance of senior inspectors in the field. (C. 261). In addition, during his six-month probationary period, Mr. Hagood was afforded extensive formal training, including an EPA three-day inspector course, 40 hours of safety training, sampling training, and 40 hours of hazardous waste training. (C. 261-268).

During his six-month probationary period, there were problems with Mr. Hagood's job performance. For example, Mr. Davis in his September 6, 1991 six-month employee pre-appraisal of Mr. Hagood's job performance found that Hagood, "should strive to further understand the practical application of the Rules and how they are promulgated from the [hazardous waste] Act. (C. 95-106). However, because Mr. Hagood was the first employee Dave Davis had hired and trained, Mr. Davis had no one

with which to compare Mr. Hagood's progress. (C. 335). Thus, despite his reservations, Mr. Davis decided that Mr. Hagood might be able to perform the job adequately with additional training. (R.99). Mr. Davis rated Mr. Hagood's probationary employment as acceptable and recommended that Mr. Hagood be given permanent merit system status. On September 23, 1991 Mr. Hagood became a permanent status employee of the Department. (C. 95-106).

After Mr. Hagood received permanent status, Mr. Davis began to doubt his decision to recommend that Mr. Hagood be given permanent status. (C. 336). Mr. Hagood frequently ignored and overlooked potential hazardous waste generation points. He failed to inspect paint spray guns at Spiral Industries (C. 272); he failed to inspect ancillary equipment at Reynolds Alloys. (C. 273). Following inspections in which the Plaintiff made errors, Mr. Davis would point out the errors to Mr. Hagood in an effort to help Mr. Hagood improve his inspection activities. The Plaintiff's errors were not always pointed out to him during the actual inspections because Mr. Davis did not want Mr. Hagood to be embarrassed in front of the facility representatives who accompanied them on inspections. Instead, Mr. Davis waited until he could speak to Mr. Hagood in private or in writing to provide guidance. In addition, pointing out Mr. Hagood's errors in front of facility representatives would have caused both Hagood and ADEM to lose credibility with the facility representative. Mr. Davis extensively conducted both verbal and written counseling with Mr. Hagood with regard to his poor job performance. (C. 271, 272-273, 281, 284, 292-293, 296-297, 298, 301, 302, 324, 326, and 356-357). (See Department's exhibits C. 95-106, 110-111, 112-117. 130-150, 152-159, 161-165, 176-179, and 166-170).

On or about May 22, 1992, Davis held a counseling session with the Plaintiff in order to address Mr. Hagood's substandard job performance. During this session, Davis gave Hagood a memo outlining the specific deficiencies in Mr. Hagood's performance. (C. 161-164). The memo noted the following deficiencies in Hagood's job performance: Hagood's failure to inspect and observe a baghouse at Stockham Valve despite its being a hazardous waste generation point (C. 269); his failure to recognize paint spray guns at Spiral Industries as a potential hazardous waste source (C. 272); and his failure to inspect underground storage tank leak alarms at Reynolds Alloys (C. 273). Davis also suggested several avenues for improvement by Mr. Hagood. (C. 161-164).

Nevertheless, Mr. Hagood's performance failed to improve. For example, Davis accompanied Mr. Hagood on an inspection trip in September, 1992 and noted numerous errors. (C. 279). These errors include an incident in which Hagood failed to observe two large and clearly improper gasoline disposal areas. Hagood walked out of one building at this site and failed to notice and inspect stressed and dead vegetation, as well as stained vegetated areas exposing gasoline laden ditches. (C. 282). After each inspection was concluded, Davis pointed out the errors Mr. Hagood made during the inspection. (C. 282-286). When the two returned to the office, Davis met with Hagood and again counseled him about his poor performance. (C. 280).

Approximately ten months after the September 1992 inspection trip, during which time the Hagood's job performance failed to improve, Davis sent a memorandum to Hagood providing that Hagood would undergo a 45-day review period. (C. 286). This memo was dated July 28, 1993. (C. 286). The memo provided that Hagood was to

receive "additional on-the-job training and also another opportunity to demonstrate [his] ability to perform both field and office tasks relative to the performance standards established for [his] position. (C. 176-177). The memo further provided that at the conclusion of the review period, Hagood would be required to perform inspections and to undergo a performance evaluation by his supervisor. (C. 287). Moreover, the memo further provided that the specific areas in which he would be evaluated were his ability to identify and observe major hazardous waste generation points, and his ability to observe and identify violations of Department regulations at regulated facilities. (C. 287-288; C. 176-77). Davis informed the Plaintiff that if he accompanied Hagood on any inspections during the review period, he would do so only as an evaluator. (R. 58). In other words, Hagood was to act as the sole inspector or "lead man" during any inspections performed during the review period. (C. 289).[2]

Davis accompanied Hagood on a number of inspections pursuant to the July 28, 1993 memorandum. (C. 176-177). During these inspections, Davis once again observed serious deficiencies in the Plaintiff's inspection activities. (C. 289). For example, Hagood discovered an open container of solvent at a regulated facility during the September, 1993 inspections; however, he failed to deduce that if the facility had a hazardous waste stored on its premises, it also had a generation point for that hazardous waste on-site as well. (C. 411; 415-418). As a result,

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[2] Designation as the lead on an inspection means the inspector is to conduct the inspection as if he were at a facility on a solo inspection. Other ADEM personnel are usually only present to evaluate an inspector's performance. This type of inspection provides the supervisor with an opportunity to evaluate the inspector's performance in the field.

Hagood failed to discover and inspect how and where the hazardous waste was generated at that site. (C. 411; 415-418).

Hagood made similar mistakes during other September 1993 inspections. Mr. Hagood failed to inspect and then inquire about paint filters in a paint booth. He also failed to investigate the identity of a material staining an extensive area of soil. (C. 290-298).

The Plaintiff's problems were not limited to just his failure to properly inspect regulated facilities (C. 161-164; 176-177; 171-175). Hagood also consistently failed to be able to apply agency regulations to real life situations in the field. During a March, 1992 inspection of a facility in which Davis accompanied the Plaintiff, Hagood failed to require the facility owners to make a waste determination even though several drums of material were poured on the ground. (C. 301). Under Department regulations, a regulated facility must make a waste determination before disposing materials in this fashion; nevertheless, Hagood failed to recognize this obvious deviation from Department regulations. (C. 301). On another occasion, Hagood failed to verbally inform a facility of how to properly achieve a tank closure. (C. 302; C. 161-64). Davis pointed out this failure to Hagood in the May 22, 1992 memo. (C. 302-303; C. 161-64). Both Davis and the senior hazardous waste inspector witnessed an incident where Hagood noted that the facility had stored some of its products in a hazardous waste storage area and then proceeded to tell the facility owner that it would have to construct a separate storage facility under Department regulations. (C. 303; 421). This was in error; under Department regulations, a facility can remain in compliance with Department regulations and still store its products in a hazardous waste disposal area. (C.

303; 421). Mr. Hagood also failed to communicate basic regulation requirements to a facility after its operators had asked him fundamental compliance questions. (C. 306). On another occasion, Hagood failed to inform a facility that it could eliminate a storage area, thereby saving the facility inspection time and money. (C. 305-306).

The final performance evaluation for Hagood chronicles continued failures by Mr. Hagood to apply the regulations to field situations. (C. 152-159). For example, Mr. Hagood failed to evaluate whether a facility had hazardous waste on-site due to a failure to properly apply Department regulations. (C. 309-310). Prior to termination, Mr. Hagood was counseled in writing, and was "down graded" on his evaluation. (C. 310-311; C. 118-122; 152-59).

Hagood also had serious problems with his ability to conduct proper on-site sampling. (C. 311). These problems were first formally addressed in the Plaintiff's first annual performance appraisal. (C. 118-22). These problems include a failure to sample obvious material on the ground (C. 312)[3]; failure to maintain chain of custody of samples by not keeping possession of the ice chest in which they were stored (C. 316-317); and a lack of knowledge of a basic sample receipt form (C. 318).

In September, 1992, Davis accompanied Hagood on an inspection during which Hagood used a dirty Gatorade™ bottle collected from a trash can to scoop up a sample of material (C. 313-316). Hagood did this because he had failed to bring a sufficient number of sampling

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[3] This is also an example of Hagood's failure to properly apply regulations while in the field.

scoops (C. 313-316). Hagood committed this obvious violation of Department sampling procedures in the presence of the facility's contact person. (C. 313-316). This occurred despite the fact that Hagood had received 16 hours of formal training in how to conduct on-site sampling, and had made numerous trips to the field to view proper sampling procedures. (C. 313). The September 1993 memo established that Hagood failed to inspect and sample the ground at a facility where it was called for by departmental procedures (C. 319).

In addition to these performance problems, Hagood also exhibited poor professionalism and demeanor while dealing with employees of regulated facilities. (C. 320-327). Hagood's demeanor included inappropriate laughter and comments to facilities' employees. (C. 320-327). He was counseled verbally and in writing regarding these problems. (C. 320, 324, 326, 328-329). Hagood was also deficient in his written work and correspondence for the Department. (C. 338-329).

Finally, Mr. Hagood poorly performed the office and record keeping tasks assigned to his job position. Mr. Hagood often would fall so far behind on his office tasks, i.e. trip memos, written correspondence, etc., that his supervisor had to keep him from returning to field assignments so that he could complete this work before generating new work. (C. 361). Davis had to have another inspector who had accompanied Mr. Hagood on an inspection trip re-draft a trip memo (written documentation of the inspector's trip to a facility, and the violations that were observed) written by Hagood because it was deficient and poorly written. (C. 371). Due to Hagood's failure to adequately process his workload in a timely manner, important correspondence with regulated facilities failed to

be sent out on time. (C. 374). In addition, Hagood's supervisor found Mr. Hagood's writing ability to be poor, and below that which was necessary to complete the record keeping demands of his job. (C. 337). On one occasion, Hagood sent a letter to a regulated facility which provided the facility with an erroneous EPA identification number. (C. 384).

On another occasion, Hagood failed to obtain an emergency EPA identification number, as previously instructed, for a regulated facility prior to leaving the office for field work, which resulted in his supervisor having to perform the task. (C. 458-459).

Hagood even traveled to Mobile (a trip that takes three hours travel one-way) for a professional seminar on the wrong day, even though the seminar date and time were provided to him well in advance of the class. (C. 449). After the termination of Hagood, his supervisor had to completely re-write one of his assignments, a project which lasted nearly four months. (C. 470-471).

During the 45-day additional performance review period provided to Hagood, he displayed a continued inability to perform the duties of his job, in particular, his inspection duties. For example Mr. Hagood again failed to inspect paint filters as a potential source of hazardous waste during this inspection period; he also failed to exhibit deductive reasoning in determining if he made a thorough inspection at Dow United; Mr. Hagood could not demonstrate that he could complete a proper file review prior to going into the field; and he failed to require a facility to make a waste determination on a large stained area. (C. 171-175).

Mr. Hagood's other deficiencies also continued during the additional performance review period of July-September, 1993. Mr. Hagood continued to exhibit an inability to apply Department regulations in real-life situations encountered while in the field. (C. 166-170). Mr. Hagood's office work continued to be sub-par and deficient (C. 166-170). He continued to display inappropriate demeanor and behavior in the presence of employees of regulated facilities. (C. 166-170).

It was only after reviewing all of these problems, and each of the incidents described herein that Davis, Hagood's supervisor, decided that it was necessary to recommend the termination of Hagood's employment. (C. 171-175). There was no conspiracy to fire Hagood (C. 463). The Department terminated Mr. Hagood's employment only after the Department exercised a full range of progressive discipline. (C. 465). The Department used verbal counseling, additional on-the-job training, extensive additional professional training, written counseling and constructive criticism, and finally an additional performance review period, all prior to the Plaintiff's termination, in its efforts to raise his job performance to a level which met standards (C. 176-179) (C. 271, 272-273, 281, 284, 292-293, 296-297, 298, 301, 302, 324, 326, and 355-356). (See Department's exhibits C. 95-106, 110-111, 112-117. 130-150, 152-159, 161-165, and 166-170).

Indeed, Hagood received more on-site and professional training than any other person holding a comparable position in the RCRA Compliance Branch of ADEM's Land Division. (C. 333-340). As a result of Mr. Hagood's failure to perform his job to standards, and only after repeated attempts were made to address the problem,

short of termination, Mr. Davis recommended that Hagood be terminated on September 27, 1993. Mr. Davis' supervisors at ADEM reviewed the facts and concurred with Mr. Davis; Mr. Hagood was formally terminated on October 15, 1993.

REASONS FOR DENYING THE PETITION

The Petitioner's stated "raison d'être" for seeking certiorari from this Court is the fact he feels he was not given due process. After a review of the record and procedural history in this case, it is evident that the Petitioner has failed by wrapping himself a little too tightly around the 14th Amendment. The fundamental purpose of the due process clause is to allow an aggrieved party the opportunity to present his case and to have its merits fairly judged. U.S.C.A. Const. Amends. 5, 14; *Okeson v. Tolley School Dist. No. 25 Renville County, State of N. D.*, 760 F.2d 864 (8th Cir. 1985), reversed 766 F.2d 378. Procedural due process requires only an opportunity to be heard at a meaningful time in a meaningful manner. U.S.C.A. Const. Amend. 5, 14; *Cherry v. Heckler*, 760 F.2d 1186 (11th Cir. 1985). The essence of due process is notice and opportunity to be heard. U.S.C.A. Const. Amend. 14, *Davis v. Lane*, 814 F.2d 397 (7th Cir. 1987).

What the 14th Amendment and due process clause do not guarantee you is that if you have your notice and meaningful opportunity to be heard, that any recommendation by the hearing officer will not be modified or altered by the State Personnel Board. The Respondents, in responding to the Petitioner's Petition For A Writ Of Certiorari to the Alabama Supreme Court divided said response into three sections. The first section dealt with why the Petitioner was not denied due process of law under

the 14th Amendment to the United States Constitution. The second section established that the cases relied on by the Petitioner in his petition are distinguishable or unpersuasive. The final section responded to the Petitioner's argument that the Personnel Board's decision affirming petitioner's termination from ADEM is the "emasculating of a terminated merit system employee's fundamental avenue of relief."

A. The Petitioner Was Not Denied Due Process Under The 14th Amendment To The Constitution.

In the instant case the Petitioner has cloaked his stated issue for certiorari in terms of his being denied due process by the State Personnel Board. However, a closer review of the argument reveals his issue remains, as it did below, one of whether there was evidence to support the Board's decision to uphold the dismissal of Hagood, in light of the Hearing Officer's recommendation. The Court of Civil Appeals of Alabama and the Supreme Court of Alabama appropriately reviewed this issue and upheld the Personnel Board's order. This issue is not available for review by this Court[4].

In support of this contention the Respondents would direct the Court to the Petitioner's summarization of his argument on page 23 of his Petition, "*(f)ollowing the hearing, the Hearing Officer entered a lengthy proposed order in which he assesses the credibility, demeanor, and veracity of the evidence. On the heals (sic) of this*

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[4] The Petitioner also agrees that this Court cannot review this issue in footnote 3 of the Petitioner's Petition For A Writ Of Certiorari, p. 15.

exhaustive proposed order, the Board, without hearing any evidence, rejected the findings and conclusions of the Hearing Officer". (Petitioner's Petition For A Writ Of Certiorari, p. 23). Also, according to Petitioner in his Statement of the Case, on March 18, 1994 the Hearing Officer, *"conducted an extensive hearing at which all affected parties were given a full and fair opportunity to present demonstrative evidence, verbal testimony and oral argument."* (Petitioner's Petition For A Writ Of Certiorari, p. 12).

The above-cited admissions by the Petitioner clearly reflect that he was afforded due process, and that his true objection is with the outcome of that due process. The heart of the Petitioner's argument is that the State Personnel Board should not have reversed the Hearing Officer, because the Hearing Officer heard the evidence ore tenus, and in his opinion *"the Board, without hearing any evidence, rejected the findings and conclusions of the Hearing Officer."* (Petitioner's Petition For A Writ Of Certiorari, p. 23). Petitioner is correct that the Board heard oral arguments, but Petitioner misleads this Court when he states "no evidence was presented." The State Personnel Board made its decision after having the benefit of reading the transcript[5], reviewing all the massive documentary presented at the hearing (C. 92-250), and hearing oral argument of counsels. Furthermore, ADEM's written exceptions to the State Personnel Board made specific references to unrefuted evidence presented in its documentary evidence at the hearing. The State Personnel Board made reference to both the documentary evidence

[5] Transcripts are not made available to hearing officers for use in making their recommendations. Respondent ADEM purchased and provided the Board with copies of the entire transcript in this case, prior to the Board issuing its final order in the case.

and ADEM's written exceptions to that documentary evidence, during the oral argument before the Board:

> **HARRELL** (Board Member): Hold on, let me get back to the hearing officer's report. In the hearing officer's report on the first page--he makes a statement, and I'm quoting, "Nothing in this hearing indicates to this hearing officer that at any time during Hagood's employment at ADEM his standard of conduct failed to be satisfactory." Yet, in the Department's rebuttal to the hearing officer's Report, there is clear documentation, that I am certain was presented at the hearing, of the performance appraisal where this employee did not meet standards. And, he was down graded on specific task statements as to why this performance appraisal did not meet standards.
>
> Now I'm confused on how the hearing officer could have access to this information and make such a statement in the hearing officer's report. Because the facts are there and if this was introduced as evidence as an exhibit at the hearing then I would have to take issue with the hearing officer's report and that statement made there. Cause it's just not true. (Emphasis added.) (See Motion to Supplement Record, C. 680).

State Personnel Board Member Harrell made clear and specific reference to the Department's documentary

evidence and the Department's written exceptions, and from her commentary, it is clear she had reviewed the documentary evidence. It simply cannot be said that Mr. Hagood was not afforded due process simply because the State Personnel Board appropriately reversed a hearing officer where there existed substantial evidence to sustain his termination.

When minimal due process requirements are met, a claim that an agency's policies or regulations have not been adhered to does not sustain an action for redress of procedural due process. U.S.C.A. Const. Amends. 5, 14; 42 U.S.C.A §§ 1981, 1983; *Goodrich v. Newport News School Bd.*, 743 F. 2d 225 (4th Cir. 1984); *Atencio v. Board of Education of Penasco Independent School District*, 658 F.2d 774 (10th Cir. 1976); *Bates v. Sponberg*, 547 F.2d 325 (6th Cir. 1976).

Undeniably, in the case at bar, Mr. Hagood's minimal due process requirements were met. Mr. Hagood even admits in his brief that the Hearing Officer *"conducted an extensive hearing at which all affected parties were given a full and fair opportunity to present demonstrative evidence, verbal testimony and oral argument."* (Petitioner's Petition For A Writ Of Certiorari, p. 12.) The Petitioner is really arguing that the State Personnel Board erroneously rejected the Hearing Officer, therefore violating either State Personnel Board Rule 670-X-5-.07(3), or *Ala. Code* § 36-26-27, (1975). The Respondents disagree with this assertion, yet even if the State Personnel Board violated the aforementioned regulation or statutory provision, it would not sustain an action for redress of procedural due process. Furthermore, the Board's order and the evidence supporting it were carefully reviewed and weighed by the Court of Civil

Appeals and the Supreme Court of Alabama, and the Board's determination was upheld.

This Honorable Court has said, "(i)t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed 2d 67 (1984). Rule 10 of the Rules of the Supreme Court of the United States states that, "*[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A Petition for a Writ of Certiorari will be granted only for compelling reasons.*" The substantial evidence found by the Board in support of the termination has been given exhaustive review before Alabama's Appellate Courts and has been upheld. The Petitioner has stated no compelling reason in support of his petition for certiorari. This issue is not properly before the United States Supreme Court and the petitioned for writ of certiorari should not lie.

B. Cases Relied On By The Petitioner Are Distinguishable Or Unpersuasive.

The Petitioner, in his brief, relies very heavily on the legal tenet of "the one who decides must hear" and a case quoting that tenet (*Morgan v. U.S.*, 298 U.S. 468, 80 L.Ed. 1288, 56 S.Ct. 906 (1931)), as persuasive authority for granting the petition for certiorari. Of course the Petitioner seeks to view that tenet in a legal vacuum, without consideration to the above-cited well established legal principles relied on by the Court of Civil Appeals in deciding this case. (See items 1-5, on pp. 28-29 of this Brief). Furthermore, a close review of the *Morgan* case reveals why the Petitioner cites only a few words from the

opinion and hails it almost as automatic authority for granting a writ of certiorari. A closer review of the *Morgan* case, *Id.*, establishes that the opinion is not dispositive of the case at bar.

The facts of the *Morgan, Id.*, case are as follows: The proceeding was instituted by an order of the Secretary of Agriculture directing an inquiry into existing rates. The Plaintiffs brought the suit attacking the Secretary's Order, in part because the hearing process had denied their due process. During the hearing before the rate examiner the court found the following occurred:

> That, at the conclusion of the taking of the testimony before an examiner, a request was made that the examiner prepare a tentative report, which should be subject to oral argument and exceptions, so that a hearing might be had before the Secretary without undue inconvenience to him, but that the request was denied, and no tentative report was exhibited to plaintiffs and no oral argument upon the issues presented by the order of inquiry and the evidence was at any time had before the Secretary. That the Secretary, without warrant of law, delegated to Acting Secretaries the determination of issues with respect to the reasonableness of the rates involved. That, when the oral arguments were presented after the original hearing, and after the rehearing, the Secretary was neither [sic], absent nor otherwise disabled, but was at his office in the Department of Agriculture, and the appointment of any other person as Acting

> Secretary was illegal. That Secretary at the time he signed the order in question had not personally heard or read any of the evidence presented at any hearing in connection with the proceeding, and had not heard or considered oral arguments relating thereto or briefs submitted on behalf of the plaintiffs, but that the sole information of the Secretary with respect to the proceeding was derived from consultation with employees in the Department of Agriculture out of the presence of the plaintiffs or any of their representatives. (Emphasis added.)

The Court further found as follows:

> While the Assistant Secretary heard argument, he did not make the decision. The Secretary who, according to the allegation, had neither heard nor read evidence or argument, undertook to make the findings and fix the rates. The Assistant Secretary, who had heard, assumed no responsibility for the findings or order, and the Secretary, who had not heard, did assume the responsibility. (Emphasis added.)

Based on those facts the United States Supreme Court found no authority for the Department of Agriculture's contention that, "one official may examine evidence, and another official who has not considered the evidence may make findings and order." The Court further reasoned, "In such a view, it would be possible ... for one official to hear the evidence and argument and arrive at certain conclusions

of fact and another official who had not heard or considered either evidence or argument to overrule those conclusions and for reasons of policy to announce entirely different ones. (*Id*, at 911-912).

The *Morgan* case is completely distinguishable from the present case. In this case Mr. Hagood was dismissed by ADEM, he appealed to the State Personnel Board, who in turn appointed a hearing officer.

The State Personnel Board, in this case, had before it copies of all the documentary evidence that the Respondent ADEM had presented at the hearing. Furthermore, ADEM's written exceptions made specific references to unrefuted evidence presented in its documentary evidence at the hearing and a copy of the transcript. The Board made reference to both the documentary evidence and ADEM's written exceptions that made reference to that documentary evidence, during the oral argument before the Board. (See p. 18 of this Brief).

State Personnel Board Member Harrell made a very clear and specific reference to the Department's documentary evidence and the Department's written exceptions, and from her commentary, it is clear she had reviewed the documentary evidence. Plainly the instant case is not in conflict with the *Morgan* case, and is quite distinguishable both factually and procedurally. In the instant case a hearing officer who heard the evidence made a recommendation to the Personnel Board.[6] The Personnel

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[6] This admission in Petitioner's Statement of the Case, contained in his Brief Of Appellee-Petitioner Hagood In Support of Petitioner [sic] For A Writ Of Certiorari, filed January 24, 1997, alone distinguishes the *Morgan* case from the case at bar.

Board, pursuant to State Personnel Board Rule 670-X-5-.07, reviewed the hearing officer's recommendation, the actual transcript of the hearing (which is important because the hearing officer did not have a copy of the transcript when he made his recommendation), the written exceptions of the Department, the oral arguments of the parties, and the written documentation (exhibits) presented at the hearing and decided to reject the hearing officer's recommendation, finding evidence to support the Department's decision to terminate. In the *Morgan* case, one hearing officer heard the evidence and another hearing officer made the recommendation without benefit of evidence or argument. The Hagood case in no way conflicts with the United States Supreme Court's decision in *Morgan,* and the decision should not serve as a basis for issuing a writ of certiorari.

Other circuits have agreed with this analysis. In *Bates v. Sponberg, supra,* the 6th Circuit Court of Appeals held that a tenured faculty member at a university was not denied his right to procedural due process on the asserted basis that the hearing on his dismissal was held before the faculty senate grievance committee but that the final judgment on his discharge was passed on by the board of regents which allegedly failed to review the record of the faculty members discharge hearing. Mr. Bates also relied very heavily on the *Morgan v. U.S., supra,* case, as noted by the court. However, the 6th circuit failed to be persuaded, holding instead:

> The primary defect which the Supreme Court found in the procedure followed by the Secretary of Agriculture in *Morgan* was his failure to consider the evidence which had been presented, though under a statutory

> duty to make that decision. The plaintiff claims that this decision, together with Justice Hughes' observation that "the one who decides must hear," indicates that the Board of Regents' conduct violated due process. We believe, however, that in its context, the statement relied upon as well as the overall nature of the decision fail to support Bates' claim. (at 331)

The Court further reasoned:

> We think the crux of the issue, in terms of due process under the Fourteenth Amendment, is not whether the due process hearing to which Professor Bates may have been entitled was held in the presence of the authority having final responsibility to determine his discharge, but instead whether the hearing accorded him was meaningful. We believe this question must be measured in terms of the issue to be decided, who is ultimately to decide it, and the manner by which the hearing is employed in the decisional process, in light of the realities of efficient administration in modern government. (at 332).

The Petitioner also cites the *Harbin* case, *infra*, as conflicting with the decision in this case. In *Harbin v. Ala. Public Service Com'n*, 474 So. 2d 63 (Ala. 1985), a freight line applied for authority to institute a new operation as a common carrier. An administrative law judge found there was insufficient evidence to demonstrate existing service was inadequate and recommended the application be

denied. The Public Service Commission ("PSC") granted the application. The existing freight lines appealed.

The PSC found that "the administrative law judge accurately summarized the evidence presented, but erred in his conclusions." (*Id.* at 64). The Circuit Court affirmed the PSC decision. The issue before the Supreme Court was whether the PSC erred in applying the law to the facts found or whether the order was based on findings of fact contrary to legal evidence of substantial weight. The Alabama Supreme Court held:

> utilizing the above statutory standard, and having carefully reviewed the record, we must conclude that the order of the APSC is supported by credible, competent, and substantial evidence. Thus we affirm the older of the circuit court which affirmed the order of the APSC. (*Id.* at 65)

Clearly the *Harbin* and this case are similar. Especially when you review the Court of Civil Appeals' Order in this case, which held that, "[a]fter reviewing the record, we conclude that Davis's evidence not only was relevant, but also sufficient to support the Board's determination. See *ADEM v. Hagood*, No. 2950408, slip op. at 5 (Ala. Civ. App. January 10, 1997). The *Harbin* case does not conflict with the decision in this case and accordingly should not serve as a basis for issuing a writ of certiorari. Actually, these two opinions are more in harmony than conflicting.

Petitioner Hagood also cites *Alabama Public Service Commission v. Perkins*, 275 Ala. 1, 151 So. 2d 627 (1962) as a case with which the opinion in *ADEM v. Hagood* conflicts. In *Perkins* a motor carrier application

was before the PSC. PSC granted the application and Perkins appealed. The circuit court reversed and the PSC appealed to the Supreme Court. The Court did find that:

> Since the attorney-examiner alone saw and heard the witnesses and observed their demeanor on the stand, it would be illogical and unwarranted on the part of both the Circuit Court not to indulge some favorable presumption in considering the attorney-examiner report as a part of the whole record. Especially this is true when the findings and conclusions find support in the evidence. (Emphasis added.) (*Id.* at 632).

The Hearing Officer's recommendation, in this case, was considered by the Board as part of the record as a whole. It simply failed to find support when measured against the voluminous documenting evidence, introduced by ADEM, and uncontested by Hagood at the hearing. Again the Court of Civil Appeals' opinion is not in conflict with the *Perkins* case, but merely in keeping with it.

None of the cases or arguments submitted by the Petitioner provide authority for this Court to grant the petition for certiorari.

C. Petitioner's Argument That The Court Of Appeals Decision Is The "Emasculating Of A Terminated Merit System Employee's Fundamental Avenue Of Relief" Is Baseless And Ill Conceived.

The Petitioner concludes his petition by decrying the Court of Appeals ruling, in this case, as the *"emasculating of a terminated merit system employee's*

fundamental avenue for relief—a hearing before a neutral adjudicator, at which time he or she has a meaningful opportunity to present evidence and refute the charges against them". These assertions by the Petitioner are ineffective and unpersuasive. The Petitioner's above characterization of the Court of Civil Appeals decision is misleading. The Court of Civil Appeals' well reasoned five page, single-spaced opinion was grounded in the following established principles of law:

1. A hearing officer is not a "co-equal statutory authority" with an agency Board. *Thompson v. Alabama Department of Mental Health*, 477 So. 2d 427 (Ala. Civ. App. 1985) (See *ADEM v. Hagood*, slip op. No. 2950408, (Ala. Civ. App. January 10, 1997), Petitioner's Petition For A Writ Of Certiorari, App. 4a.);

2. The State Personnel Board has the authority to "modify, alter, set aside or affirm [a hearing officer's] report". Regulation 670-X-5-.07, Alabama State Personnel Department Administrative Code, (See *ADEM v. Hagood*, No. 2950408, (Ala. Civ. App. January 10, 1997), Petitioner's Petition For A Writ Of Certiorari, App. 4a.);

3. If the State Personnel Board rejects an officer's findings, the Board's supporting evidence must be substantial when measured against the officer's findings as well as the contrary evidence; *Personnel Board v. King*, 456 So. 2d 80, 82 (Ala. Civ. App. 1984), (See *ADEM v. Hagood*, slip op. No. 2950408, (Ala.

Civ. App. January 10, 1997), Petitioner's Petition For A Writ Of Certiorari, App. 4a.)

4. Substantial evidence is "relevant evidence that a reasonable mind would view as sufficient to support a determination". *Creagh v. City of Mobile Police Department*, 543 So. 2d 698, 699 (Ala. Civ. App. 1989) (citation omitted), (See *ADEM v. Hagood*, slip op. No. 2950408, (Ala. Civ. App. January 10, 1997), Petitioner's Petition For A Writ Of Certiorari, App. 4a.); and finally

5. If the Alabama Court of Civil Appeals concludes that there was evidence to support an agency board's order, then it must affirm. *State Department of Corrections v. Cooke*, 530 So 2d 839 (Ala. Civ. App. 1988), (See *ADEM v. Hagood*, slip op. No. 2950408, (Ala. Civ. App. January 10, 1997), Petitioner's Petition For A Writ Of Certiorari, App. 4a.).

The Court of Civil Appeals searched the entire record in this case (including the written documentary evidence submitted by the Department at the hearing) and found evidence to support the State Personnel Board's order and accordingly and appropriately affirmed its order, by reversing the Circuit Court. The hearing officer does not have co-equal statutory authority with the State Personnel Board, and the Board may reject a hearing officer's findings even though not clearly erroneous, if the other evidence provides sufficient support for its decision. *State Department of Corrections v. Cooke*, 530 So.2d 839 (Ala. Civ. App. 1988). Clearly the opinion of the Court of Civil Appeals in this case is in keeping with the law of the State

of Alabama, and a petition for a writ of certiorari should not be granted.

CONCLUSION

WHEREFORE, it is respectfully requested, that for the reasons and arguments contained in this Brief In Opposition To Petition For Certiorari, that the Petition for Writ of Certiorari be denied.

Respectfully submitted this the 14th day of August 1997.

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